Supreme Court, U.S.
FILED

No. 091514 JUN 10 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

BETTY LYN II, Motor Yacht, Official No. 55036, *in rem*, and BLYN II HOLDING, LLC, a Texas Limited Liability Company, *in personam*,

Petitioner,

vs.

CRIMSON YACHTS, an unincorporated division of Horizon Shipbuilding, Inc., an Alabama corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES T. LISTON
FRANCIS I. SPAGNOLETTI*
DAVID S. TOY
SPAGNOLETTI & CO.
401 Louisiana Street, 8th Floor
Houston, Texas 77002
(713) 653-5600 – Telephone
(713) 653-5656 – Facsimile
frank@spaglaw.com

**Counsel of Record*

Attorneys for Petitioner, Blyn II Holding, LLC

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

These proceedings raise the issue of whether the BETTY LYN II is a "vessel" so as to be subject to a maritime lien under the Federal Maritime Lien Act, 46 U.S.C. §§ 31341-31343. More specifically, the questions presented are:

1. Whether the Court of Appeals for the Eleventh Circuit correctly applied the definition of the term "vessel" as used in 1 U.S.C. section 3, as that term was construed by this Court in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), and *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995).

2. Whether the concept of being "in navigation" remains a component of vessel status in situations where an object has been removed from the water for an extensive period of time, as this Court indicated in *Stewart*, 543 U.S. at 494, and *Chandris*, 515 U.S. at 374 ("At some point, however, repairs become sufficiently significant that the vessel can no longer be considered in navigation.").

3. Alternatively, if this Court determines the BETTY LYN II is a "vessel," whether the BETTY LYN II is a "dead ship" that is not subject to a maritime lien because it has been removed from maritime commerce. *See, e.g., Amoco Oil v. M/V Montclair*, 766 F.2d 473, 477 (11th Cir. 1985) (a dead ship is a ship withdrawn from navigation and maritime commerce); *see also Roper v. United States*, 368 U.S. 20, 22 (1961).

PARTIES TO THE PROCEEDING

Petitioner is Blyn II Holding, LLC, a Texas Limited Liability Company, which was a defendant in the District Court, and appellee in the interlocutory appeal to the Eleventh Circuit Court of Appeals.

Respondent is Crimson Yachts, an unincorporated division of Horizon Shipbuilding, Inc., which is an Alabama corporation. Respondent was the plaintiff in the District Court and the appellant in the interlocutory appeal to the Eleventh Circuit Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINION AND JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
STATUTES AND SUPREME COURT CASES INVOLVED	2
FACTUAL BACKGROUND AND STATEMENT OF THE CASE	4
(I) Course of Proceedings and Disposition Below	4
(II) Statement of the Facts	6
REASONS FOR GRANTING WRIT	11
Reason 1 This Court's decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), announced a uniform definition of the term "vessel" which includes the requirement that a vessel be capable of being used as a means of transportation on water. 1 U.S.C. § 3. *Stewart* cited *Chandris, Inc. v. Latsis*, 515 U.S. 347, 374 (1995), which further notes, at some point, repairs to a vessel become sufficiently significant that the vessel can no longer be considered in navigation and hence loses its vessel status. The District Court correctly applied *Stewart*; the Court of Appeals did not....	12

TABLE OF CONTENTS – Continued

Page

Reason 2 The BETTY LYN II was not "in navigation" because it had been removed from service for a period of lengthy repairs and refurbishment. Apart from *Stewart* and *Chandris*, the District Court's decision complies with, and is compelled by, controlling precedent which has long recognized the "in navigation" component as controlling the issue of vessel status in repair situations *See Waganer v. Sea-Land Service, Inc.*, 486 F.2d 955, 958 (5th Cir. 1973); *Erwin v. Lykes Bros. S.S. Co.*, 472 F.2d 1217, 1219 (5th Cir. 1973); and *Hodges v. S.S. TILLIE LYKES*, 512 F.2d 1279, 1280 (5th Cir. 1975) 19

Reason 3 In the alternative, in the event this Court determines the BETTY LYN II is a "vessel" within the purview of 1 U.S.C. § 3, the BETTY LYN II is a dead ship that has been removed from navigation and hence, not subject to an *in rem* lien. *See, e.g., Amoco Oil v. M/V Montclair*, 766 F.2d 473, 477 (11th Cir. 1985) (a dead ship is "a ship withdrawn from navigation and maritime commerce"); *see also Roper v. United States*, 368 U.S. 20, 22 (1961)..... 25

CONCLUSION..... 29

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion of the United States Court of Appeals for the Eleventh Circuit, *Crimson Yachts v. BETTY LYN II Motor Yacht*, ___ F.3d ___, 2010 WL 1434098 (11th Cir. April 12, 2010) ..... App. 1

Order of the United States District Court for the Southern District of Alabama, *Crimson Yachts v. Lyn*, 2009 WL 485074 (S.D. Ala. Feb. 26, 2009) ..... App. 25

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS:

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) ....*passim*

Desper v. Starved Rock Ferry Corp., 342 U.S. 187 (1952) 17

North Pacific S.S. Co. v. Hall Bros. Marine Railway & Shipbuilding Co., 249 U.S. 119 (1919) 18

Roper v. United States, 368 U.S. 20 (1961) 25

Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957) 16

Stewart v. Dutra Construction Co., 543 U.S. 481 (2005) .....*passim*

United New York & New Jersey Sandy Hook Pilots Assn. v. Halecki, 358 U.S. 613 (1959) 17

West v. United States, 361 U.S. 118 (1959) 16, 17

UNITED STATES COURT OF APPEALS DECISIONS:

Amoco Oil v. M/V Montclair, 766 F.2d 473 (11th Cir. 1985) 25, 26

Board of Commissioners v. M/V BELLE OF ORLEANS, 535 F.3d 1299 (11th Cir. 2008) 13

Delome v. Union Barge Line Co., 444 F.2d 225 (5th Cir. 1971) 21, 26

DiGiovanni v. Traylor Bros., Inc., 959 F.2d 1119 (1st Cir. 1992) 16

TABLE OF AUTHORITIES – Continued

Page

Drake v. E. I. DuPont deNemours & Co., 432 F.2d 276 (5th Cir. 1970) 22

Erwin v. Lykes Bros. S.S. Co., 472 F.2d 1217 (5th Cir. 1973) 19, 22, 23

Hodges v. S.S. TILLIE LYKES, 512 F.2d 1279 (5th Cir. 1975) 19, 23, 24

McKinley v. All Alaskan Seafoods, Inc., 980 F.2d 567 (9th Cir. 1992) 17, 28

Robert E. Blake, Inc. v. Excel Environmental, 104 F.3d 1158 (9th Cir. 1997) 27, 28

Waganer v. Sea-Land Service, Inc., 486 F.2d 955 (5th Cir. 1973) 19, 21, 22

UNITED STATES DISTRICT COURT DECISIONS:

Colonna's Shipyard, Inc. v. USAF General Hoyt S. Vandenberg, 584 F.Supp.2d 682 (E.D. Va. 2008) 20

Crimson Yachts v. Lyn, 2009 WL 485074 (S.D. Ala. Feb. 26, 2009) (order) 1

FEDERAL STATUTES:

1 U.S.C. § 1 15

1 U.S.C. § 3 ..... *passim*

46 U.S.C. § 31342 ..... 3, 4, 14

TABLE OF AUTHORITIES – Continued

Page

RULES OF COURT:

Supreme Court Rule 13 2

OTHER AUTHORITIES:

T.J. Schoenbaum, ADMIRALTY & MARITIME LAW (1994 ed.) 26

PETITION FOR WRIT OF CERTIORARI

Petitioners seek review of the published opinion of the Eleventh Circuit Court of Appeals issued on April 12, 2010, App. 1, respectfully showing:

OPINION AND JUDGMENT BELOW

In the underlying lawsuit, the plaintiffs claimed a maritime lien against the BETTY LYN II, arguing it was a vessel and having it arrested. The District Court concluded it was not a vessel, however, and dissolved the lien, because it had been removed from navigation for extensive repairs and thus did not meet the statutory definition of the term "vessel," 1 U.S.C. § 3, as it was construed by this Court in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), and *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). The District Court's unpublished order dissolving the *in rem* seizure is reported as *Crimson Yachts v. Lyn*, 2009 WL 485074 (S.D. Ala. Feb. 26, 2009). App. 25.

These proceedings arise out of an interlocutory appeal from the District Court's dissolution of the *in rem* lien.

On appeal, the Court of Appeals for the Eleventh Circuit reversed, determining the BETTY LYN II was a vessel, and this Court's construction of the term "vessel" in *Stewart*, 543 U.S. 481 (2005), was not pertinent to this particular case: "*Stewart* did not

decide whether a ship taken out of the water for extensive repairs was a vessel. *Stewart*'s holding, thus, does not decide the issue before us." App. 20. The Court of Appeals published opinion is reported as *Crimson Yachts v. Betty Lyn II Motor Yacht*, ___ F.3d ___ (11th Cir., Apr. 12, 2010) (No. 09-11288).

The issue is worthy of this Court's review because the Eleventh Circuit Court of Appeals qualified this Court's opinion in *Stewart v. Dutra Construction Co.*, thus creating confusion and introducing possible inconsistency into the definition of the term "vessel."

STATEMENT OF JURISDICTION

The Court of Appeals for the Eleventh Circuit issued its published opinion on April 12, 2010. App. 1. No motion for rehearing was filed. This Petition for Writ of Certiorari was filed within 90 days after the Court of Appeals issued its opinion. This Court thus possesses jurisdiction under 28 U.S.C. section 1254(1), and Supreme Court Rule 13.

STATUTES AND SUPREME COURT CASES INVOLVED

"The word "vessel" includes every description of watercraft or other artificial contrivance used, or

capable of being used, as a means of transportation on water." 1 U.S.C. § 3

> (a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner –
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.
>
> (b) This section does not apply to a public vessel.

46 U.S.C. § 31342.

Unlike the Eleventh Circuit Court of Appeals, the District Court correctly applied this Court's decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), which requires, among other things, a vessel be capable of being used for transportation over the water in order to be a "vessel" under the general statutory definition of the term provided in 1 U.S.C. section 3.[1] *Stewart* also indicates a vessel must be "in navigation" in order to be a device susceptible for use in maritime commerce. Stewart cited *Chandris, Inc.*

---

[1] *Stewart*, 543 U.S. at 494-95, construing 1 U.S.C. § 3 and citing *Chandris, Inc. v. Latsis*, 515 U.S. 347, 374 (1995) ("at some point, however, repairs become sufficiently significant that the vessel can no longer be considered in navigation.").

v. Latsis, 515 U.S. 347, 374 (1995), which explicitly states, "at some point, repairs to a vessel become sufficiently significant that the vessel can no longer be considered in navigation." *Id.* Here, the BETTY LYN II is incapable of being used for water transportation – and, hence, not in navigation – because for over two years it was undergoing major repairs on dry land and was unable to readily return to the water to function as a vessel. Hence, the BETTY LYN II was not a "vessel" within the meaning of section 3 of Title 1 of the U.S. Code and a maritime lien could not properly attach under 46 U.S.C. § 31342. The District Court correctly applied this Court's teachings in *Stewart* and *Chandris* and dissolved the *in rem* attachment. The Court of Appeals failed to follow this Court's application of 1 U.S.C. § 3 as set forth in *Stewart* and *Chandris*.

This Court should grant the writ of certiorari to clarify the statutory definition of the term "vessel" and the applicability of its decisions regarding that definition.

FACTUAL BACKGROUND AND STATEMENT OF THE CASE

(I) Course of Proceedings and Disposition Below

These proceedings arise from a dispute over extensive work that is being performed on a motor yacht, the BETTY LYN II. The dispute is between

Horizon Shipbuilding – a shipyard performing work on the yacht under a contract – and the owners of the BETTY LYN II.

When Horizon Shipbuilding attempted to assert a maritime lien against the BETTY LYN II, its owners (who are the Petitioners herein) maintained the BETTY LYN II was a dead ship not classified as a vessel under maritime law, and argued there could be no *in rem* lien. In a written opinion, the District Court for the Southern District of Alabama determined the BETTY LYN II was not a "vessel" as the term is defined under title 1 of the U.S. Code, section 3, in accordance with this Court's construction in *Stewart*. The District Court dissolved Horizon Shipbuilding's *in rem* attachment, citing *Stewart v. Dutra Construction*, 543 U.S. 481 (2005), which interpreted section 3 of Title 1 of the U.S. Code. App. 31. Horizon Shipbuilding's *in personam* claim against the owners of the BETTY LYN II remained in place.

Horizon Shipbuilding took an interlocutory appeal to the Court of Appeals for the Eleventh Circuit.

On April 12, 2010, in a published opinion, the Court of Appeals held, "the Betty Lyn II retained a practical ability to engage in maritime transport and is, therefore, a vessel subject to maritime liens and the district court's admiralty jurisdiction." App. 24. In reaching this conclusion, the appeals court determined this Court's decision in *Stewart v. Dutra*

Construction Co., 543 U.S. 481 (2005), did not address whether a vessel that had been removed from the water for extensive repairs was a vessel. Instead, the appeals court stated, "*Stewart's* holding . . . does not decide the issue before us. Rather, we must decide this case by looking at its distinct factual circumstances and their legal implications." App. 20.

(II) Statement of the Facts

The BETTY LYN II is a 132-foot yacht built in 1974. In approximately the spring of 2006, the parties herein agreed to have Crimson Yachts, an unincorporated division of Horizon Shipbuilding, perform a major overhaul on the BETTY LYN II to include extension of its decks and replacement of its engines, generators, navigation equipment, plumbing and wiring. The original estimated duration of the repair was approximately 15 months. This was agreed to in principle, and the BETTY LYN II's engines, propellers, propeller shafts, generators and most of its furniture and equipment were removed from the BETTY LYN II at a shipyard in Texas; the BETTY LYN II was towed from Texas to Horizon's shipyard in Bayou La Batre, Alabama around October 1, 2006. App. 2-3, 31-32.

When the BETTY LYN II arrived at Horizon's shipyard in June 2006, she had no engines, generators, shafts, propellers, or rudders and the furniture and much equipment had been removed. She was not then capable of moving under her own

motive power. Much of the work to be performed by Horizon Shipbuilding to the BETTY LYN was such that it was necessary to take it out of the water. The work did require the replacement of much machinery and virtually all electronics. App. 2-3, 31-32.

Crimson Yachts began work on the BETTY LYN II in October 2006. The work required Crimson to remove the BETTY LYN II from the water with cranes and place her on a cradle. The work and payments continued until 2008, when a dispute concerning the quality, costs, and scope of the work arose. App. 23.

Horizon's president acknowledged the refit work turned out to be a major overhaul and refurbishment of the BETTY LYN and Horizon did not challenge any of the fact findings made by the District Court. App. 39. As found by the District Court,[2] the scope of the work undertaken by Horizon Shipbuilding included all of the following:

- Removing all remaining machinery, equipment, furnishings, electronics, wiring, plumbing, windows and doors, stripping the craft bare;
- Replacing the existing three engines with two more powerful engines;

[2] Doc. 45 at pp. 5-7, App. 32-34.

- Scaling the center shaft rendered unnecessary by the two new engines, making it part of the hull;
- Creating two new shaft lines or tunnels to accommodate the two new engines, which required cutting through the hull;
- Recessing the propeller into the bottom of the hull;
- Cutting through the hull to install port and starboard stabilizers;
- Adding a skeg/keelson along the external center line;
- Putting a newer bottom on the hull;
- Extending the fuel tank on the transom;
- Replacing the two generators;
- Modifying a forward engine room bulkhead;
- Removing and reinstalling joiner bulkheads;
- Extending the sun decks;
- Installing teak decking on all exterior decks;
- Replacing teak cap rail;
- Raising the wheelhouse one foot;
- Replacing the AC, refrigeration and ventilation systems;
- Replacing the windlass, ground tackle, rudders and all running gear;

- Replacing the sea valves and all associated plumbing;
- Replacing all electronics and navigational equipment, including GPS, radar, Fathometers, radios, depth sounders, and navigational lights;
- Replacing all life rafts, emergency position indicating radio beacon, signaling gear, and firefighting equipment;
- Replacing tender and crane/davit system;
- Replacing all electrical wiring, panels and associated systems;
- Replacing all plumbing, pumps and sanitation systems;
- Replacing all doors, windows and portholes;
- Replacing all interior furnishings, soft goods and appliances; and
- Removing all paint and completely fairing, below and above the waterline.[3]

Horizon has not disputed the nature or extent of work on the BETTY LYN II. Indeed, Horizon's President admitted the work constituted a "major overhaul," "major refurbishment," "major outfitting," and "major rehabilitation" and the District Court agreed and

---

[3] Doc. 23, Goff Affidavit at 2; Short Affidavit at 6-7; Transcript at 23, 30, 33, 50, 57-58, 62, 67.

correctly so found.[4] The following statements about the BETTY LYN II's condition were made by Horizon in its Appellant's Brief to the Eleventh Circuit Court of Appeals:

- " . . . the engines, propellers, and propeller shafts were removed from the Betty Lyn at a shipyard in Texas . . . " Horizon's Appellant's Brief at page 3;
- "Upon arrival [at Appellant Horizon's Bayou La Batre shipyard], she had no engines, generators, shafts, propellers or rudders, and the furniture and much equipment had been removed." *Id.* at page 3, citing Document 42 at page 9;
- "She was capable of navigation upon arrival at [Appellant Horizon's Bayou La Batre shipyard], but not under her own motive power." *Id.* at page 3, citing Document 42 at page 33;
- "Much of the work to be performed by Horizon to the Betty Lyn was such that it was necessary to take it out of the water." *Id.* at page 5, citing Document 28-2 at page 6; Document 42 at pages 57-58;

---

[4] Doc. 45 at pp. 7,10; *see also* Horizon Shipbuilding's Brief to the Eleventh Circuit Court of Appeals at p. 7 ("The President of Horizon acknowledged that the refit work turned out to be a major overhaul and refurbishment, although it started out somewhere between repair work and major overhaul.")

- "The work did require the replacement of much machinery and virtually all electronics." *Id.*, citing Document 28-2 at page 6. " . . . it was later determined by the vessel owner to remove and replace virtually all of the electrical, plumbing and equipment. [sic]" *Id.*; and

- " . . . the Betty Lyn is not able to move under her own motive power, as the engines, new propeller shafts and propellers have yet to be fully installed." *Id.* at page 6, citing Document 28-2 at page 7.

The District Court properly found two years after the BETTY LYN II arrived at Horizon's shipyard it is unable to return to service as a vessel.[5]

REASONS FOR GRANTING WRIT

The Eleventh Circuit Court of Appeals failed to follow this Court's teachings regarding the definition of the term "vessel" as set forth in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), and *Chandris, Inc. v. Latsis*, 515 U.S. 347, 374 (1995). In order to confirm the uniform applicability of the statutory definition of the term "vessel" as found in section 3 of Title 1 of the U.S. Code, this Court should grant writ,

[5] *See* Doc. 45 (District Court's order): "The Betty Lyn remains in the shipyard, with a good bit of work completed and a good bit more not accomplished."

and upon review, reverse the decision of the Court of Appeals and reinstate the decision of the District Court, which properly followed *Stewart*:

Reason 1 **This Court's decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), announced a uniform definition of the term "vessel" which includes the requirement a vessel be capable of being used as a means of transportation on water. 1 U.S.C. § 3. *Stewart* cited *Chandris, Inc. v. Latsis*, 515 U.S. 347, 374 (1995), which further notes at some point, repairs to a vessel become sufficiently significant that the vessel can no longer be considered in navigation and hence loses its vessel status. The District Court correctly applied *Stewart;* the Court of Appeals did not.**

The District Court concluded " . . . there is no question but that the Betty Lyn was not in navigation, and thus was not a vessel" under Section 3, at any relevant time. App. 31. The District Court correctly applied this Court's decision in *Stewart* to conclude the BETTY LYN II had ceased to become a vessel because it had lost its transportation function. App. 31. The Court of Appeals, however, concluded *Stewart* did not speak to the issue of vessel status with respect to the facts of this particular case, and reversed. App. 20.

Stewart represented a subtle change in the law of vessel status. *Stewart*: (1) announced the term "vessel" as used in various federal statutes has a uniform statutory definition which is furnished by 1 U.S.C. section 3, and simultaneously (2) recognized the unified, statutory definition includes an "in navigation" component. With respect to the second feature, *Stewart* instructs the "in navigation" requirement "is relevant to whether the craft is 'used, or capable of being used' for maritime transportation."[6] *Stewart* is clearly a case where this Court strove to bring uniformity to the definition of the term "vessel." Some pre-*Stewart* decisions did not define the term "vessel" using 1 U.S.C. section 3, and some suggested the "in navigation" component of vessel status only applied to personal injury (*i.e.*, Jones Act or unseaworthiness) cases.

Stewart now requires courts to employ a unified definition of the term "vessel" to *all* types of admiralty proceedings. Indeed, the Eleventh Circuit itself concluded *Stewart* applies to maritime lien cases as well as to personal injury cases.[7] The

---

[6] 543 U.S. at 496.

[7] The fact the *Stewart* rationale applies to maritime lien cases, and is not simply limited to Jones Act or unseaworthiness or personal injury cases is confirmed by the Eleventh Circuit's opinion in *Board of Commissioners v. M/V BELLE OF ORLEANS*, 535 F.3d 1299 (11th Cir. 2008), a maritime lien case involving the nonpayment of dockage, wharfage, and charges incurred by a vessel. *Id.* at 1306 ("The BELLE OF ORLEANS' status as a vessel is crucial to establishing admiralty

(Continued on following page)

Eleventh Circuit's treatment of *Stewart* is disruptive to this uniformity.

In *Stewart*, Willard Stewart was injured while working on a dredge for Dutra, a dredging company. Stewart alleged Dutra was negligent and sued the company in federal district court. The district court ruled a dredge is not a "vessel in navigation" and therefore Stewart could not sue under the Jones Act. The First Circuit Court of Appeals affirmed. This Court granted certiorari on the issue of vessel status. In a unanimous opinion delivered by Justice Thomas, this Court held the Revised Statutes of 1873 specified in any act passed after 1871, the "vessel" included any watercraft capable of transportation. The requirement a worker be on a vessel "in navigation," simply meant that the vessel be capable of transportation. The *Stewart* opinion recognized this included dredges which, both then and now, transported equipment and a crew over water.[8]

Stewart made clear the term "vessel" as used across federal maritime statutes, including the maritime lien act, 46 U.S.C. § 31342, is defined by the definition of that term presented at title 1 of the U.S. Code, section 3. As the Court noted, section 3 supplies the default definition of "vessel" throughout the U.S.

---

jurisdiction . . . [o]ur determination of whether the BELLE OF ORLEANS is a "vessel" is guided by the Supreme Court's decision in *Stewart* . . . ").

[8] *Stewart*, 543 U.S. at 494-96.

Code, "unless the context indicates otherwise." 1 U.S.C. § 1. Section 3 provides, "The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. Section 3 merely codified the meaning the term "vessel" had acquired in general maritime law.[9]

With respect to these proceedings, this Court in *Stewart* noted the concept of a vessel being "in navigation" was directly relevant to the craft's ability to be used for maritime commerce:

> . . . the "in navigation" requirement *is an element of the vessel status of a watercraft.* It is relevant to whether the craft is "used, or capable of being used" for maritime transportation. A ship long lodged in a drydock or shipyard can again be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. The question remains in all cases whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one.[10]

In support of the fact "being in navigation" is an essential component of vessel status, the *Stewart* Court cited this Court's decision in *Chandris*,[11] which

---

[9] *Stewart*, 543 U.S. at 496.

[10] *Stewart*, 543 U.S. at 494.

[11] *Chandris*, 515 U.S. 347, 374 (1995).

noted, repairs to a vessel can become sufficiently significant so the vessel can no longer be considered in navigation:

> Under our precedent and the law prevailing in the circuits, it is generally accepted that "a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside," *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1121 (CA1) (en banc), *cert. denied*, 506 U.S. 827, 113 S.Ct. 87, 121 L.Ed.2d 50 (1992), even when the vessel is undergoing repairs. *See Butler, supra*, at 271; *Senko* [*v. La Crosse Dredging Corp.*], 352 U.S., at 373 [1957]; *Norris*, *supra*, at 364 ("[A] vessel is in navigation . . . when it returns from a voyage and is taken to a drydock or shipyard to undergo repairs in preparation to making another trip, and likewise a vessel is in navigation, although moored to a dock, if it remains in readiness for another voyage" (footnotes omitted)). At some point, however, repairs become sufficiently significant that the vessel can no longer be considered in navigation. In *West v. United States*, 361 U.S. 118 (1959), we held that a shoreside worker was not entitled to recover for unseaworthiness because the vessel on which he was injured was undergoing an overhaul for the purpose of making her seaworthy and therefore had been withdrawn from navigation. We explained that, in such cases, "the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work

> contracted to be done." *Id.*, at 122. *See also United New York & New Jersey Sandy Hook Pilots Assn. v. Halecki*, 358 U.S. 613 (1959); *Desper* [*v. Starved Rock Ferry*], 342 U.S., at 191. *The general rule among the Courts of Appeals is that vessels undergoing repairs or spending a relatively short period of time in drydock are still considered to be "in navigation" whereas ships being transformed through "major" overhauls or renovations are not. See Bull*, 6 U.S. F. Mar. L. J., at 582-584 (collecting cases).
>
> Obviously, while the distinction at issue here is one of degree, the prevailing view is that "major renovations can take a ship out of navigation, even though its use before and after the work will be the same." *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 570 (CA9 1992).[12]

Thus, the "in navigation" requirement is not an "engrafting" of an extraneous requirement into the statute, but rather an essential component of vessel status that has arisen through decisional law and has thus become an integral part of the term "vessel." If many of the "in navigation" cases happen to arise out of personal injury claims, the fact this Court in *Stewart* cited *Chandris* means it intended to fashion a unified definition of the term "vessel" that applies to all areas of the maritime law.

---

[12] *Chandris*, 515 U.S. at 374 (emphasis added).

In short, this Court's teachings in *Stewart* and in *Chandris* compelled the District Court's dissolution of the lien. As correctly found by the District Court, the BETTY LYN II was not in navigation because, for over two years, it was undergoing major repairs so as to be out of the water, not under its owner's control, and unable to readily return to the water and navigate or be used for transportation. The *Stewart* and *Chandris* opinions reflect the term "vessel" includes an "in navigation" component. The District Court simply applied the law of vessel status as it was recently expounded by an unanimous United States Supreme Court in *Stewart* in 2005. The Eleventh Circuit erred as a matter of law in failing to apply the teachings of *Stewart*.

Instead of following *Stewart*, the Eleventh Circuit relied heavily on a 1919 decision of this Court in a direct appeal, *North Pacific Steamship Co. v. Hall Bros. Marine Railway and Shipbuilding Co.*, 249 U.S. 119 (1919), in which this Court found admiralty jurisdiction over a contract for the performance of services and the furnishing of necessaries for the repairs of the steamship YUCATAN. *Id.* at 223-224. *North Pacific Steamship* is chiefly distinguishable because this 1919 direct appeal arose out of the furnishing of services and necessaries to a vessel. On certiorari, this Court can consider whether the holding in *North Pacific* survives 1 U.S.C. section 3, and its construction in *Stewart*.

In conclusion, the District Court's decision to dismiss the *in rem* claim against the BETTY LYN II

was compelled by this Court's construction of the statutory term "vessel" as propounded in *Stewart v. Dutra Construction*. The Court of Appeals's opinion sets aside *Stewart*'s unifying effect. *Stewart*'s citation of *Chandris* and its overall attempt to fashion a uniform definition of the term vessel reflects change in the law, and the District Court properly so interpreted it. This Court should grant writ and review the matter so as to ensure a consistent and uniform definition of the term "vessel."

Reason 2 **The BETTY LYN II was not "in navigation" because it had been removed from service for a period of lengthy repairs and refurbishment. Apart from *Stewart* and *Chandris*, the District Court's decision complies with, and is compelled by, controlling precedent which has long recognized the "in navigation" component as controlling the issue of vessel status in repair situations. *See Waganer v. Sea-Land Service, Inc.*, 486 F.2d 955, 958 (5th Cir. 1973); *Erwin v. Lykes Bros. S.S. Co.*, 472 F.2d 1217, 1219 (5th Cir. 1973); and *Hodges v. S.S. TILLIE LYKES*, 512 F.2d 1279, 1280 (5th Cir. 1975).**

In addition to the fact this Court in *Stewart* defined the term "vessel" by using 1 U.S.C. section 3 so as to include a requirement the vessel be in navigation or capable of performing a transportation

function, prior case law confirms a vessel which has been removed from service due to prolonged repair and/or extensive refitting loses any vessel status it may have once enjoyed. The District Court correctly followed these cases, whereas the Court of Appeals did not. This Court should affirm the decision of the District Court because it confirms not only that the principles espoused in *Stewart* are valid, but it comports with other concepts of the general maritime law as well.

Prior appellate precedent is fully consistent with this Court's announcements in *Stewart* and *Chandris*[13] because it establishes that lengthy and extensive repairs effectively remove a vessel from navigation, and hence deprive it of vessel status.[14] As an example, the District Court's opinion properly cited three Fifth Circuit Court of Appeals cases which were dispositive of the principle that lengthy and protracted repairs remove a vessel from navigation.

---

[13] "The general rule among the Courts of Appeals is that vessels undergoing repairs or spending a relatively short period of time in drydock are still considered to be 'in navigation' whereas ships being transformed through 'major' overhauls or renovations are not. . . ." "Obviously, while the distinction at issue here is one of degree, the prevailing view is that "major renovations can take a ship out of navigation, even though its use before and after the work will be the same." *Chandris*, 515 U.S. at 374.

[14] *See and compare Colonna's Shipyard, Inc. v. USAF General Hoyt S. Vandenberg*, 584 F.Supp.2d 682, 871-72 (E.D. Va. 2008) (recognizing that in the Eleventh Circuit, "major repairs take a vessel out of navigation, not into it.")

As can be seen, these three cases conform to the principles announced by this Court in *Stewart* and *Chandris,* and demonstrate the BETTY LYN II lost its vessel status by virtue of the fact it had been removed from navigation:

A. *Waganer v. Sea-Land Service, Inc.*, 486 F.2d 955, 958 (5th Cir. 1973):

Waganer involved a claim against a Sea-Land service vessel, the S.S. MAIDEN CREEK. In *Waganer*, the appeals court noted the issue of whether repairs take a vessel out of navigation depends on the extent of the repair operations and on who controls those operations. The court remarked that a primary touchstone for distinguishing between major and minor repairs is the purpose for which the vessel has been idled. A vessel which temporarily leaves commerce, enters a shipyard for minor repairs, and thereupon returns to commerce, remains in navigation.[15]

The *Waganer* court noted:

> The vessel entered port under its own power and had already completed part of the survey. The Chief Mate, Taylor, testified on deposition that no "major" repairs were to be done, that is, that no structural changes, alterations in the hull, or major overhauling were contemplated. Further, the affidavit of

[15] *Waganer,* 486 F.2d at 958, *citing Delome v. Union Barge Line Co.*, 444 F.2d 225 (5th Cir. 1971), *cert. denied*, 404 U.S. 995 (1972).

> John H. van Aken, a marine surveyor and consultant, indicated that he felt the repairs to be minor. The lay up time was twenty-one days in all. Under similar circumstances, this court has held that to deny navigational status to the ship in question "seems hardly plausible." *Drake v. E. I. DuPont deNemours & Co.*, 5 Cir. 1970, 432 F.2d 276, 277. Without intimating an opinion as to how the trier of fact should resolve the question, we are constrained to hold that there is a genuine issue of fact as to the extent of the repairs to be done by ADDSCO.

486 F.2d at 958. *Waganer* reflects the approach used by courts to determine the issue of extent of repairs, and that consistent with *Chandris*, extensive repairs can effectively take a vessel out of navigation.

B. *Erwin v. Lykes Bros. S.S. Co.*, 472 F.2d 1217, 1219 (5th Cir. 1973):

In *Erwin*, the Court of Appeals for the Fifth Circuit held the determination of whether a vessel undergoing repairs was "in navigation" focused on the extent of repair operations. The Court of Appeals affirmed a district court finding the S.S. LOUISE LYKES, which was undergoing a major overhaul necessary to enable her to remain in commerce with her engines, generators, boilers and pumps having been dismantled and, the crew had signed off, was not in navigation. As the appeals court noted:

> . . . the vessel was undergoing a major overhaul necessary to enable her to remain in commerce as an American flag vessel. *Her engines, generators, boilers, and pumps were dismantled.* Power was supplied from shore. Her crew had signed off. *She had to be moved by tugs.* . . . Under these circumstances, we hold that the district court properly found that the vessel was not in navigation at the time of the injury.

Erwin, 472 F.2d at 1219 (emphasis added). Erwin reflects a vessel whose engines and other machinery have been dismantled is not classified as a vessel because it has been removed from navigation.

C. *Hodges v. S.S. TILLIE LYKES*, 512 F.2d 1279, 1280 (5th Cir. 1975):

In *Hodges*, the Court of Appeals for the Fifth Circuit held a vessel that had undergone "an extensive overhaul" costing over $600,000 and lasting 77 days was not in navigation. As the court found:

> The Tillie Lykes underwent an extensive overhaul that lasted seventy-seven days. Dixie Machine was the primary contractor in charge of refurbishing the ship for its five-year special survey required by the American Bureau of Shipping, though other off-shore contractors performed some repairs. The crew of the Tillie Lykes was discharged during these operations, and only a few Lykes personnel remained aboard to watch the ship and provide access to various parts

> of the vessel. They had no supervisory power over the employees of Dixie Machine, who performed both structural changes and regular maintenance. At the time appellant allegedly slipped on sandblasting debris, there were no Lykes personnel on board. *The Tillie Lykes did not move under its own power during these operations, but had to be towed by tug from one drydock to another.* The total costs of repairs incurred by Lykes Brothers was $660,145.

Hodges, 512 F.2d at 1280 (emphasis added).

Given the undisputed evidence of the extensive repairs, the prolonged work, and the cost of the work on the BETTY LYN II, the District Court correctly applied case law to conclude the BETTY LYN II was removed from navigation and lacked any ability to serve as waterborne transport. As such, no maritime lien could arise.

The District Court correctly applied binding precedent, not to mention the rationale explained in *Chandris* and cited in *Stewart*, and dismissed Appellant Horizon's *in rem* lien against the BETTY LYN II. In contrast, the Court of Appeals for the Eleventh Circuit failed to follow this Court's teachings in *Stewart* and *Chandris*, ignoring the fact that "at some point. . . repairs become sufficiently significant that the vessel can no longer be considered in navigation." *Chandris*, 515 U.S. at 374. The Eleventh Circuit's opinion fails to address these issues.

This Court should grant writ in this matter in order to clarify and prevent inconsistency in the law of vessel status.

Reason 3: In the alternative, in the event this Court determines the BETTY LYN II is a "vessel" within the purview of 1 U.S.C. § 3, the BETTY LYN II is a dead ship that has been removed from navigation and hence, not subject to an *in rem* lien. *See, e.g., Amoco Oil v. M/V Montclair*, 766 F.2d 473, 477 (11th Cir. 1985) (a dead ship is "a ship withdrawn from navigation and maritime commerce"); *see also Roper v. United States*, 368 U.S. 20, 22 (1961).

The owners of the BETTY LYN II argued to the District Court, *inter alia*, the BETTY LYN II was a "dead ship," and thus it was impossible for any maritime lien to be asserted against it.[16] The District Court, however, decided the BETTY LYN II was not a "vessel" as the term was defined by this Court and dismissed Horizon's *in rem* claim.[17]

---

[16] *See, e.g.*, Doc. 23, p. 8 (the BETTY LYN II was removed from navigation in mid-2006 and has not been able to function as a vessel ever since that time); p. 9 (describing the BETTY LYN II as a "dead ship").

[17] *See* App. 29. The District Court noted Petitioners had characterized the BETTY LYN II was a "dead ship," and a dead

(Continued on following page)

However, in the event this Court concludes the BETTY LYN II is a "vessel" within the purview of the statute, this Court should nevertheless affirm the District Court's decision on the independent grounds the BETTY LYN II is a "dead ship" that was removed from navigation.

A vessel that has been withdrawn from navigation is not liable *in rem* for actions that occur while it is not in navigation because it is not a ship in any meaningful sense of the word. It is a "dead ship." As noted by a maritime scholar, "[u]nder the majority view, a vessel that is withdrawn from navigation may not be the object of a maritime lien." T.J. Schoenbaum, ADMIRALTY & MARITIME LAW (1994 ed.) at 428, and authorities cited therein. This rule is followed in the Eleventh Circuit.[18] It is followed by the Fifth Circuit where a ship leaves the water for the purpose of repair.[19] It is also explicitly recognized by this Court in *Chandris*, 515 U.S. at 374.

---

ship was one that was "withdrawn from navigation and maritime commerce" and is no longer a vessel. The District Court, however, declined to base its decision on the "dead ship" doctrine, finding it to be "more commonly associated with ships laid up indefinitely and with no likelihood of a prompt return to service, as with a mothball fleet." App. 29.

[18] *See, e.g., Amoco Oil*, 766 F.2d at 477 (11th Cir. 1985) (a dead ship is "a ship withdrawn from navigation and maritime commerce").

[19] *See, e.g., Delome v. Union Barge Line Co.*, 444 F.2d 225, 232 (5th Cir. 1971).

When a vessel enters a yard for a lengthy period of refurbishing or renovation, as opposed to routine repairs, the ship is considered to be removed from navigation and thus not the subject of an *in rem* lien. For example, in *Robert E. Blake, Inc. v. Excel Environmental*,[20] the Ninth Circuit Court of Appeals held an indemnity claim that arose under a contract involving the repair and re-activation of ship that had been in storage for "several years" and deactivated, was outside admiralty jurisdiction. This was true despite the fact the work that was being performed on the ship was intended to return it to navigation. In the words of the appeals court:

> The *Cape Bover* had been out of service for several years as of 1990. Upon inclusion in the ready reserve fleet, a number of steps are taken to protect the ships. For example, hatches and other exterior openings are sealed to protect against the weather and dehumidification, cathodic protection, and fire and flooding alarm systems are installed. When vessels in the Ready Reserve Fleet are reactivated they must successfully complete sea trial and pass a United States Coast Guard inspection. One of Blake's employees described the *Cape Bover* as a "dead ship" at the time the contract was formed. In November of 1990, Excel approached Blake and offered to perform the insulation repair work. On December 4, 1990, Blake was

---

[20] 104 F.3d 1158, 1160, 1162 (9th Cir. 1997).

> instructed to begin reactivation of the *Cape Bover*. Blake then proceeded to hire subcontractors, awarding the insulation project to Excel.[21]

Under these facts, the court held there was no vessel. Similarly, in *McKinley v. All Alaskan Seafoods, Inc.*,[22] the Ninth Circuit Court of Appeals recognized although a ship that temporarily leaves commerce and enters a shipyard for routine or minor repairs is still "in navigation" for purposes of determining seaman status, an oil drill ship that was undergoing conversion to a seagoing fish and crab processing ship was not "in navigation" at time of a fire aboard the ship which killed a worker, who was thus not a "seaman" within meaning of the Jones Act. The vessel was being completely converted, rather than undergoing repair, and it was not usable for its intended purpose at time of the accident; moreover, whether vessel owner or contractor had control of vessel while it was undergoing conversion was not dispositive when work was so extensive as to constitute conversion, as opposed to mere repair.[23]

In the event this Court determines the statutory definition of the term "vessel" encompasses the BETTY LYN II, Petitioner urges the opinion of the Court of Appeals be reversed, and the District Court's

---

[21] 104 F.3d at 1160.

[22] 980 F.2d 567, 570 (9th Cir. 1992).

[23] 980 F.2d at 570.

dissolution of the lien be affirmed under the long-established "dead ship" doctrine.

CONCLUSION

The Eleventh Circuit Court of Appeals erred in determining the BETTY LYN II was a vessel in navigation against which a maritime lien could properly be asserted. Its decision ignores this Court's teachings in *Stewart* and *Chandris*, and undermines this Court's construction of the term "vessel" under section 3 of Title 1 of the U.S. Code. In contrast, the District Court correctly applied this Court's decisions which require, among other things, a vessel be in navigation or capable of water transportation in order to satisfy the definition of "vessel" under section 3 of Title 1 of the U.S. Code. The District Court's opinion not only follows *Stewart* and *Chandris*, but it conforms to established case law which recognizes lengthy and extensive repairs remove a vessel from navigation, so as to deprive it of vessel status.

The facts of this case reflect this is *not* an ordinary situation where a vessel sails to a repair yard, is quickly repaired, and sails off. Rather, this is a case where the object in question did not arrive at the yard under its own power, was extensively and substantially refurbished out of the water for a period of over two years, and remains unable to perform as a vessel to this day. The transportation function

ingrained in section 3, Title 1 of the U.S. Code, and discussed in *Stewart*, is demonstrably absent.

The opinion of the Eleventh Circuit Court of Appeals fails to address the statutory requirements of being capable of water transportation that this Court emphasized in *Stewart*. At the same time, the District Court's decision complies fully with *Stewart* and this Court's earlier pronouncement in *Chandris* about a vessel being "in navigation." The decision of the Eleventh Circuit Court of Appeals should be reversed, and the decision of the District Court affirmed. Petitioner prays for all relief to which it is justly entitled.

Respectfully submitted,

JAMES T. LISTON
FRANCIS I. SPAGNOLETTI
DAVID S. TOY
SPAGNOLETTI & CO.
401 Louisiana Street, 8th Floor
Houston, Texas 77002
(713) 653-5600 – Telephone
(713) 653-5656 – Facsimile

Attorneys for Petitioner

603 F.3d 864

United States Court of Appeals,
Eleventh Circuit.

CRIMSON YACHTS, an unincorporated division of Horizon Shipbuilding, Inc., an Alabama corporation, Plaintiff-Appellant,

v.

BETTY LYN II MOTOR YACHT, Official No. 55036, in rem, Blyn II Holding, LLC, Defendants-Appellees.

No. 09-11288.

April 12, 2010.

J.W. Goodloe, Jr., Vickers, Rils, Murray & Curran, L.L.C., Mobile, AL, for Crimson Yachts.

Francis I. Spagnoletti, David S. Toy, James Thomas Liston, Spagnoletti & Co., Houston, TX, John Patrick Kavanagh, Jr., Burr & Forman, LLP, Mobile, AL, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

Before BLACK, MARCUS and HIGGINBOTHAM,* Circuit Judges.

BLACK, Circuit Judge:

Appellant, shipyard Crimson Yachts, seeks to enforce a maritime lien for major repairs it performed

---

* Honorable Patrick E. Higginbotham, United States Circuit Judge for the Fifth Circuit, sitting by designation.

on a motor yacht, Appellee the BETTY LYN II. Crimson Yachts claims the yacht's owner, Appellee BLyn II Holding, LLC (Blyn), failed to make full payment for the repairs. Crimson Yachts sued the BETTY LYN II *in rem,* and sued BLyn *in personam,* to recover the remainder of the debt. Pursuant to Appellees' joint motion, the district court dismissed the *in rem* claims against the BETTY LYN II and vacated its arrest. The district court found the BETTY LYN II was not a "vessel" subject to maritime liens. Because the maritime lien was a prerequisite to the court's admiralty jurisdiction, the court concluded it lacked jurisdiction over the *in rem* proceeding against the BETTY LYN II. The issue we resolve on appeal is whether the BETTY LYN II is a vessel and, therefore, subject to maritime liens and the court's admiralty jurisdiction. We conclude that she is and reverse and remand for further proceedings.

I. BACKGROUND

The BETTY LYN II is a 132-foot yacht built in 1974. In 2006, the parties agreed to have Crimson Yachts perform a major overhaul on the BETTY LYN II to include, *inter alia,* extension of its decks and replacement of its engines, generators, electronics, navigation equipment, plumbing, and wiring. The original estimated duration of the repair was 15 months. After the parties agreed to the repairs, the BETTY LYN II's engines, propellers, propeller shafts, generators, and most of its furniture and equipment were removed, and it was towed to Crimson Yachts's

shipyard in Alabama. Crimson Yachts began work on the BETTY LYN II around October 1, 2006. The repairs required Crimson Yachts to remove the BETTY LYN II from the water with cranes and place her on a cradle in a covered shed. The work and the corresponding payments continued for a year and a half. Then, in March 2008, BLyn allegedly ceased payment for the repairs. Crimson Yachts claims the amount in unpaid invoices currently exceeds $1,200,000.

Crimson Yachts filed suit on June 11, 2008. The Appellees jointly filed a motion to vacate the arrest of, and to dismiss the *in rem* claims against, the BETTY LYN II for lack of admiralty jurisdiction. The district court held a motion hearing on October 29, 2008 at which the court heard testimony about the overhaul and condition of the BETTY LYN II.[1] On February 26, 2009, the district court issued an order concluding that a ship must be "in navigation" to be a "vessel," and finding the major overhaul of the BETTY LYN II had taken the yacht out of navigation, thereby divesting her of her status as a vessel. The

[1] "[W]hether maritime jurisdiction exists is a question anterior to, although often coincident with, the question of whether the plaintiff has a maritime lien." *Wilkins v. Commercial Inv. Trust Corp.*, 153 F.3d 1273, 1276 (11th Cir.1998). As in *Armour & Co. v. Fort Morgan S.S. Co.*, 270 U.S. 253, 46 S.Ct. 212, 70 L.Ed. 571 (1926), this "case is not of that class where the existence of jurisdiction is conclusively determined by the first pleading of him who institutes the suit," but rather requires us to "consider whether the facts developed after the filing . . . preclude the exercise of admiralty jurisdiction." *Id.*, 270 U.S. at 258-59, 46 S.Ct. at 214

district court dismissed the *in rem* claims against the BETTY LYN II and vacated her arrest. This timely interlocutory appeal followed.

II. STANDARD OF REVIEW

The Constitution empowers the federal judiciary to hear "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III § 2, cl. 2. Congress, in accordance with Article III, vested in federal district courts "original and exclusive jurisdiction over 'any case of admiralty or maritime jurisdiction.'" *Sea Vessel, Inc. v. Reyes,* 23 F.3d 345, 348 (11th Cir.1994) (quoting 28 U.S.C. § 1333(1)). This Court reviews *de novo* the district court's dismissal for lack of admiralty jurisdiction. *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans,* 535 F.3d 1299, 1305 (11th Cir.2008).

III. DISCUSSION

An *in rem* admiralty proceeding requires as its basis a maritime lien. *The Rock Island Bridge,* 73 U.S. (6 Wall.) 213, 215, 18 L.Ed. 753 (1867). "A maritime lien is a special property right in a ship given to a creditor by law as security for a debt or claim," and it attaches "the moment the debt arises." *Dresdner Bank AG v. M/V Olympia Voyager,* 465 F.3d 1267, 1272 (11th Cir.2006) (citing *Galehead, Inc. v. M/V Anglia,* 183 F.3d 1242, 1247 (11th Cir.1999) (quotations omitted)). Maritime liens differ from other common law liens in that a maritime lien is "not simply a

security device to be foreclosed if the owner defaults"; rather, a maritime lien converts the vessel itself into the obligor and allows injured parties to proceed against it directly. *Amstar Corp. v. S/S ALEXANDROS T.*, 664 F.2d 904, 908-09 (4th Cir.1981). This is called an *in rem* proceeding. "An *in rem* suit against a vessel is . . . distinctively an admiralty proceeding, and is hence within the exclusive province of the federal courts." *Belle of Orleans,* 535 F.3d at 1314 (quoting *Am. Dredging Co. v. Miller,* 510 U.S. 443, 446-47, 114 S.Ct. 981, 985, 127 L.Ed.2d 285 (1994)).

Federal district courts obtain *in rem* jurisdiction over a vessel when a maritime lien attaches to it. *Industria Nacional Del Papel, CA. v. M/V Albert F,* 730 F.2d 622, 625 (11th Cir.1984). Upon filing an *in rem* complaint, the clerk of court issues a warrant for the arrest of the *res. See Merchs. Nat'l Bank v. Dredge Gen. G.L. Gillespie,* 663 F.2d 1338, 1340 n. 1 (5th Cir.1981) (quoting Fed.R.Civ.P., Supplemental Rules for Certain Admiralty and Maritime Claims (Rule C)). The *res* remains in the court's custody during the proceeding as serves as both the respondent and the subject matter. *See* 2 Benedict on Admiralty § 21 at 2-6 to 2-8 (7th ed. rev.1998).

The Federal Maritime Lien Act, 46 U.S.C. §§ 31341-31343, grants maritime liens to particular persons based on their relationship to, or service of, a vessel. For example, the Act grants a maritime lien to "a person providing necessaries to a vessel." *See id.* § 31342(a). The Act then grants maritime lienholders the right to "bring a civil action *in rem* to enforce the

lien." *Id.* In other words, "[a] maritime lien gives to its holder a property right in a vessel, and the proceeding in rem is . . . a means of enforcing the property right." *See Merchs. Nat'l Bank,* 663 F.2d at 1346. A maritime lien cannot be executed or divested outside of an *in rem* proceeding. *Vandewater v. Mills,* 60 U.S. 82, 89, 19 How. 82, 15 L.Ed. 554 (1856).

Crimson Yachts claims that its repair work on the BETTY LYN II entitles it to a maritime lien. Crimson Yachts sought to enforce this lien by filing *in rem* claims against the BETTY LYN II and causing the court to effect her arrest. Appellees claim Crimson Yachts's work on the BETTY LYN II did not result in a maritime lien, because the yacht is not a "vessel" according to maritime law, and thus is not subject to maritime liens. The issue, then, is whether the BETTY LYN II is a "vessel" subject to maritime liens and the court's jurisdiction, or whether the extensive and time-consuming nature of the repairs divested the BETTY LYN II of her vessel status, thereby making her ineligible for a maritime lien and depriving the district court of admiralty jurisdiction over the *in rem* claims in this case.

A. The Purpose of Maritime Liens

In resolving whether the district court's admiralty jurisdiction encompasses the claims against the BETTY LYN II, we review the purpose, origin, and development of maritime liens. "The maritime lien developed as a necessary incident of the operation of

vessels." *Piedmont & George's Creek Coal Co v. Seaboard Fisheries Co.*, 254 U.S. 1, 8, 41 S.Ct. 1, 3, 65 L.Ed. 97 (1920) (elaborating on the intent behind § 31342(a)'s predecessor statute, the Act of June 23). Maritime liens have special features designed to protect persons who own, sail, and service ships from the unique risks associated with the shipping industry.

Maritime liens originated, in part, "in a desire to protect the ship," which is "peculiarly subject to vicissitudes which would compel abandonment . . . unless repairs and supplies were promptly furnished." *Id.* at 9, 41 S.Ct. at 3. Ships braved the danger of the seas dependent on a solid construction and a skillful crew. Should structure or seaman fail, ships had little to compensate for the loss and, at times, had to seek the help of strangers. Ships, however, often lacked items of sufficient value to offer in exchange for the help they needed.

Because a ship was often in need of repairs and necessaries while it was away from its home port and without large sums of money on board, maritime liens enabled persons in charge of the ship to use the value of the vessel itself as a pledge of credit in order to secure the work and parts it needed during the voyage. *Id.*; *see also Veverica v. Drill Barge Buccaneer No. 7*, 488 F.2d 880, 883 (5th Cir.1974) ("The very purpose of maritime liens is to encourage necessary services to ships whose owners are unable to make

contemporaneous payment.");[2] *The Alligator,* 161 F. 37, 40 (3d Cir.1908) (explaining maritime liens facilitate commerce by encouraging merchants to furnish ships with supplies and repairs); 2 Benedict on Admiralty § 21 at 2-1 (7th ed. rev.1998). "Moneys are not usually loaned to strangers, residents of distant and foreign countries, without security, and it would be a violent presumption to suppose that any such course was adopted when ample security in the vessel was lying before the parties." *Wilkins v. Commercial Inv. Trust Corp.,* 153 F.3d 1273, 1276 (11th Cir.1998) (citing *The Emily Souder,* 84 U.S. (17 Wall.) 666, 671, 21 L.Ed. 683 (1873)).

Maritime liens could attach "even if the vessel owner ha[d] not personally contracted" for the services performed. *S.E.L. Maduro (Fla.), Inc. v. M/V Antonio de Gastaneta,* 833 F.2d 1477, 1482 (11th Cir.1987); *see also* 46 U.S.C. § 31341(a). This feature, too, addressed the unique needs of ships sailing far away from their home ports.

In addition to the unique nature of maritime liens, the maritime-lien priority system facilitated a ship's ability to offer something of value in exchange for what it needed. Maritime liens have priority over non-maritime liens and priority over other maritime

[2] The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard,* 661 F.2d 1206, 1207, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

liens in reverse chronological order: that is, the most recent lien possesses the superior claim. *The Emily Souder,* 84 U.S. (17 Wall.) at 672; *The St. Jago de Cuba,* 22 U.S. (9 Wheat.) 409, 416, 6 L.Ed. 122 (1824); *see also* 2 Benedict on Admiralty § 51 at 4-1 to 4-4 (7th ed. rev.1998). This is because "[i]f liens created by the necessities of vessels in a foreign port could be subordinated to or displaced by mortgages to prior creditors at home, such liens would soon cease to be regarded as . . . affording any reliable security." *The Emily Souder,* 84 U.S. (17 Wall.) at 672. This reverse-chronology priority system does no disservice to earlier claimants because, as with funds, when services are "[a]dvanced for the security and protection of the vessel, they . . . benefit . . . the mortgagees as well as . . . the owners." *See id.* Most importantly, the priority system encourages repairmen to service the ships of strangers without knowing anything of the ship's prior credit history. These special features facilitate ships' ability to contract with persons able to supply and repair them, wherever ships might find themselves.[3]

---

[3] Also influencing the development of maritime liens may have been the historical concept of a vessel as a person with independent liability. *See Detroit Trust Co. v. Barlum S.S. Co.,* 293 U.S. 21, 48, 55 S.Ct. 31, 40, 79 L.Ed. 176 (1934) ("The ship from the moment her keel touches the water . . . acquires personality; she becomes competent to contract, is individually liable for her obligations, and is responsible for her torts.") (quotations omitted); *see also Equilease Corp. v. M/V Sampson,* 793 F.2d 598, 602 (5th Cir.1986) (en banc), *cert. denied,* 479 U.S.

(Continued on following page)

Maritime liens have additional qualities specially designed to protect those furnishing ships with repairs and supplies. For instance, maritime liens protect repairmen and suppliers from clients who might be tempted to sail their vessels away after services are rendered. *See Equilease Corp. v. M/V Sampson,* 793 F.2d 598, 602 (5th Cir.1986) (en banc) ("The federal maritime lien is a unique security device, serving the dual purpose of keeping ships moving in commerce while not allowing them to escape their debts by sailing away."); *see also Ventura Packers, Inc. v. F/V JEANINE KATHLEEN,* 305 F.3d 913, 919 (9th Cir.2002). Maritime liens allow injured parties, such as unpaid repairers or suppliers, to "obtain redress . . . without seeking compensation abroad from the vessel's owner," enabling them to proceed directly against the vessel *in rem. See Amstar Corp. v. S/S ALEXANDROS T.,* 664 F.2d 904, 909 (4th Cir.1981). The liens vest in "creditors who provide supplies which are necessary to keep the ship going. . . . the right to appropriate the vessel, have it sold, and be repaid the debt from the proceeds." *Silver Star Enters., Inc. v. Saramacca MV,* 82 F.3d 666, 668 (5th Cir.1996) (quoting *Dampskibsselskabet Dannebrog v.*

984, 107 S.Ct. 570, 93 L.Ed.2d 575 (1986) ("The maritime lien concept thus somewhat personifies a vessel as an entity with potential liabilities independent and apart from the personal liability of its owner."); *Merchs. Nat'l Bank,* 663 F.2d at 1345 ("The maritime lien has at its basis, to a substantial extent, the historical and theoretical concept of personification. . . ."); 2 Benedict on Admiralty § 21 at 2-2 (7th ed. Rev.1998).

Signal Oil & Gas Co., 310 U.S. 268, 280, 60 S.Ct. 937, 943, 84 L.Ed. 1197 (1940) and *Equilease*, 793 F.2d at 602).

The adhesive nature of maritime liens provides additional protection to repairmen and suppliers. Unlike mechanics' and materialmen's liens, maritime liens do not depend on the injured party's possession of the vessel; a maritime lien travels with the vessel wherever it goes, regardless of into whose hands it may pass, whether or not the lien is recorded. *Vandewater*, 60 U.S. (19 How.) at 89 (1856) (describing a maritime lien as a "secret" right of the lienholder in the property even when he is "without actual possession or any right of possession," and acknowledging the lien remains with the vessel, even surviving its purchase by a bona fide buyer); *Equilease*, 793 F.2d at 602.

Thus, maritime liens benefit those who own, lend to, and repair vessels, such that persons able to provide for ships' immediate needs are assured a significant, clear, and predictable security device that is tailored to the unique features of maritime commerce.

B. A Brief History of Maritime Lien Legislation

It is not surprising that, given the historical nature and special needs of the shipping industry, maritime lien laws are no recent development. Maritime liens existed in Continental Europe and first emerged in the United States through state and

common law. *See* 2 Benedict on Admiralty §§ 36-37 at 3-21 to 3-22; § 41, at 3-44 (7th ed. rev.1998). This decentralized development of the lien laws resulted in a "confusing collection of individual statutes enacted over . . . centuries – each enacted to solve some particular problem of the day." *See* H.R. REP. NO. 100-918, at 11 (1988). The statutes were "poorly organized, duplicative, often obsolete, and difficult to understand and apply." *Id.*

The competing legal regimes governing maritime liens were further complicated by geographical variance. Different locations had different rules governing whether liens could attach, depending on, for example, a ship's origin and port of service. *See* H.R. REP. NO. 46-1698 at 1-3 (1880). The laws also differed as to when during the repair process a lien could attach. *Id.* Congress recognized the need to unify and simplify the law. *See The Gertrude,* 38 F.2d 946, 948 (5th Cir.1930) (noting one of the purposes of the Act of June 23, 1910 was to replace state maritime-lien statutes with a single, national law).

In 1910, Congress passed the first version of the Federal Maritime Lien Act, establishing a uniform national maritime lien system. *See id.*; Act of June 23, 1910, ch. 373 § 1, 36 Stat. 604 (current version at 46 U.S.C. § 31342(a)). The Act of June 23, 1910 stated:

> Any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a

> person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

In enacting the statute, Congress did not intend to "change the general principles of the law of maritime liens"; instead, Congress meant "to simplify and clarify the rules [governing] maritime liens as to which there had been much confusion," to eliminate "artificial distinction[s]," and to "substitute [ ] a federal statute for numerous state statutes." *Dampskibsselskabet Dannebrog*, 310 U.S. at 271-72, 60 S.Ct. at 939-40; *Equilease*, 793 F.2d at 602-03 (noting prior to the Act there was "a discrepancy . . . as to when and under what circumstances" a maritime lien would apply and noting that with the enactment of the law, "a single federal statute is substituted for the state statutes . . . and the old geographical distinctions are gone").

The first national law laid a solid foundation for creating a comprehensible and user-friendly lien system, but it did not totally eliminate the confusion surrounding maritime liens. As a result, the Act was amended over time for the purpose of further simplifying and clarifying the lien system. *See, e.g.*, H.R. REP. NO. 100-918, at 11 (1988), U.S.Code Cong. & Admin.News 1988, pp. 6104, 6104. The most recent version of the law was enacted in 1989, when 46 U.S.C. § 31342 superseded an amended version of the original Act "without significant change." *In re*

Container Applications Int'l, Inc., 233 F.3d 1361, 1363 n. 2 (11th Cir.2000).

Like its predecessors, Congress passed the current version of the Federal Maritime Lien Act to resolve misunderstandings that had developed about the meaning of the Act; Congress did not intend to effect any dramatic substantive change. *Dresdner Bank*, 465 F.3d at 1272 n. 3; *Silver Star Enters.*, 82 F.3d at 668 n. 2; H.R. REP. NO. 100-918, at 15 (1988), U.S.Code Cong. & Admin.News 1988, p. 6108. In enacting the current statute, Congress sought to eliminate any confusion surrounding the meaning of the law and intended that "the literal language of the statute [w]ould control the disposition of the cases" interpreting it. H.R. REP. NO. 100-918, at 16 (1988), U.S.Code Cong. & Admin.News 1988, p. 6109.

C. "Vessel" Status as a Prerequisite to Attaching a Maritime Lien

Notably, in each iteration of the Federal Maritime Lien Act, the statutory language specifies that only repairs performed on a "vessel" generate a maritime lien. Thus, a ship's characterization as a "vessel" is a mandatory prerequisite to the attachment of a maritime lien. Because a district court's authority to arrest a ship and to adjudicate an *in rem* proceeding against it requires the attachment of a maritime lien, both the lien and the district court's jurisdiction depend on a ship's status as a "vessel."

Title 1 U.S.C. § 3 provides the default definition of "vessel" for the entire United States Code. *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 490, 125 S.Ct. 1118, 1124, 160 L.Ed.2d 932 (2005). "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. This case hinges on whether the BETTY LYN II falls within that description. If the BETTY LYN II is not capable of being used for water transportation, Crimson Yachts cannot possibly have a maritime lien for the repairs it performed on her, and the district court would, therefore, have no admiralty jurisdiction to adjudicate the *in rem* claims.

In deciding whether a watercraft is a vessel, "the focus . . . is the craft's capability, not its present use or station." *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299, 1310 (11th Cir.2008). The dispositive question is "whether the watercraft's use as a means of transportation on water is a practical possibility or merely a theoretical one." *Id.* (quoting *Stewart*, 543 U.S. at 496, 125 S.Ct. at 1118) (quotation marks omitted); *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295, 300 (5th Cir.2008); *see also Holmes v. Atlantic Sounding Co.*, 437 F.3d 441, 448 (5th Cir.2006) ("Under § 3, a 'vessel' is *any* watercraft practically capable of *maritime transportation*, regardless of its primary purpose or state of transit at a particular moment." (quotations omitted)).

Shortly after the passage of the original federal maritime lien statute, the Supreme Court expounded on which ships qualify as vessels for the purpose of admiralty jurisdiction. *See N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 39 S.Ct. 221 (1919). The Supreme Court made clear that a ship towed into port for extensive repairs may remain a vessel subject to admiralty jurisdiction during the overhaul. The steamship in question in *Hall Brothers* "had been wrecked, and had remained submerged for a long time; ice floes had torn away the upper decks, and some of her bottom plates also needed to be replaced." *Id.* at 123, 39 S.Ct. at 222. Like the BETTY LYN II, the ship in *Hall Brothers* was towed to a ship yard and then placed in drydock to undergo extensive repairs – in that case, to ready the ship for an Alaskan voyage. *Id.* The Supreme Court held that the steamship, despite its dilapidated state and extensive overhaul, remained subject to admiralty jurisdiction during the repair period. *Id.* at 129, 39 S.Ct. at 224.

The former Fifth Circuit, too, provided early guidance as to which ships were vessels subject to maritime liens. *See Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir.1955). In *Pleason*, the plaintiffs sought to enforce a maritime lien on the steamship the CAROL ANN for work done converting the ship into a shrimp processing, freezing, and storage plant. *Id.* at 622-23. The defendants argued the CAROL ANN was not a "vessel" under maritime law. *Id.* at 622. When the CAROL ANN was brought

in for repairs, she had been gutted and had to be towed, much like the BETTY LYN II in this case. *Id.* at 622-23. The CAROL ANN had no propellers, propeller shafts, crew, working machinery, light, heat, power, engines, or steering apparatuses when she was brought in for repairs. *Id.* Although she regained her own power system, the repairs left the CAROL ANN without motive or steering power and moored to a dock by steel cables with her telephone and electric lines connected to the land. *Id.* at 623.

The CAROL ANN was afloat, had a superstructure, masts, decks, and cabins and was capable of being towed both before and after the repairs. *Id.* Thus, the *Pleason* Court held that the steamship was a vessel, emphasizing she was "*capable* of being used as a means of water transportation." *Id. Pleason*, like *Hall Brothers*, suggests the BETTY LYN II is a vessel despite undergoing a massive overhaul, because she maintained her structure and was capable of being towed both prior and subsequent to the repairs at issue.

In *Belle of Orleans*, this Circuit, guided in part by *Pleason*, held that a gambling boat that broke free during Hurricane Katrina, severely damaging itself and a marina, was a vessel for purposes of admiralty jurisdiction, even though it had steel cables mooring her to the shore and her electric, computer, sewage, and phone systems were linked to land. 535 F.3d at 1307, 1316. As the BELLE OF ORLEANS maintained a captain, a crew, a deck, a superstructure, cabins, engines, and generators, and was afloat and capable

of being towed in for repairs, this Circuit held it satisfied the requirements of 1 U.S.C. § 3. *Id.* at 1312.

The *Belle of Orleans* Court distinguished between vessels that are "temporarily stationed in a particular location" and non-vessels "*permanently* affixed to shore or resting on the ocean floor." *Id.* at 1310 (quoting *Stewart*, 543 U.S. at 493-94, 125 S.Ct. at 1127) (emphasis added).[4] This dichotomy is useful in examining the BETTY LYN II. Despite her "state of transit at [the] particular moment," *see Stewart*, 543 U.S. at 497, 125 S.Ct. at 1129, the BETTY LYN II had been towed in for repairs, maintained her structure during the overhaul, and could have been put in the water and towed within 24 hours. She was not permanently affixed to land or to the bottom of the ocean in a manner that sapped her practical capacity to serve as a mode of transportation on water. *Belle of Orleans*, therefore, suggests the BETTY LYN II retained her vessel status during the repair period.

---

[4] Ships rendered permanently incapable of maritime transportation are "dead ships" ineligible for maritime liens. *See Amoco Oil v. M/V Montclair*, 766 F.2d 473, 477 (11th Cir.1985) ("A 'vessel' is subject to a maritime lien. A 'dead ship' is not."), *see also Colonna's Shipyard, Inc. v. U.S.A.F. GEN. HOYT S. VANDENBERG*, 584 F.Supp.2d 862, 867 (E.D.Va.2008) ("A key element in determining whether a watercraft that was indisputably a vessel at some point in the past is now a 'dead ship' is whether such watercraft is *permanently* withdrawn from navigation.") (citing *Hercules Co. v. The Brigadier Gen. Absolom Baird*, 214 F.2d 66, 68 (3d Cir.1954)).

Belle of Orleans also relied, in part, on the Supreme Court decision in *Stewart v. Dutra Construction Co. See Belle of Orleans*, 535 F.3d at 1306, 1309-12. In *Stewart*, the Supreme Court decided whether a person injured while working on a dredge called the Super Scoop could recover worker's compensation under the Jones Act, an act that protects only seamen.[5] 543 U.S. at 485-86, 125 S.Ct. at 1122-23. The *Stewart* Court analyzed the term "vessel in navigation," because "the key to seaman status is employment-related connection to a vessel in navigation," *Chandris, Inc. v. Latsis*, 515 U.S. 347, 357, 115 S.Ct. 2172, 2184, 132 L.Ed.2d 314 (1995) (quotations omitted). The *Stewart* Court held that, although it was idle, with one scow at sea and the other without a working engine, the Super Scoop was a vessel in navigation because it "had not been taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport." 543 U.S.

---

[5] The Jones Act was born from Congress' recognition of the greater perils of a life at sea and provides more extensive worker's compensation recovery for seamen than that available to land-based workers under the Longshore and Harbor Workers' Compensation Act (LHWCA) *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354-56, 368, 370, 115 S.Ct. 2172, 2183-84, 2190, 132 L.Ed.2d 314 (1995); *see Baunbridge v. Merchants'. & Miners' Transp. Co.*, 287 U.S. 278, 282, 53 S.Ct. 159, 160, 77 L.Ed. 302 (1932) ("Seamen have always been regarded as wards of the admiralty, and their rights, wrongs, and injuries a special subject of the admiralty jurisdiction. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class." (citations omitted)).

at 496, 125 S.Ct. at 1128. The Court stated that in determining whether a watercraft constitutes a "vessel" under § 3, "[t]he question remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Id.* (citation omitted).

The district court relied on *Stewart* for the proposition that a watercraft taken out of navigation is no longer a vessel. *Stewart* does mention that a ship's navigational status is "relevant" to whether it is practically capable of transportation on water. 543 U.S. at 496, 125 S.Ct. at 1128. The Court does not, however, *require* that a ship be "in navigation" to be considered a "vessel" for purposes of 1 U.S.C. § 3.[6]

As we have discussed, *Stewart* decided whether a worker on a floating dredge was a seaman. *Stewart* did not decide whether a ship taken out of the water for extensive repairs was a vessel. *Stewart's* holding, thus, does not decide the issue before us. Rather, we must decide this case by looking at its distinct factual circumstances and their legal implications. *Nehring v. S.S. M/V Point Vail*, 901 F.2d 1044, 1050 (11th Cir.1990). *Stewart* simply reinforces our precedent,

---

[6] Benedict on Admiralty succinctly states the conclusion compelled by precedent and a review of the intent behind the maritime lien system: "[T]here is no reason why a vessel which has been withdrawn from navigation but which is still technically capable of being used in navigation should escape the provisions of the [Federal Maritime Lien Act]". 2 Benedict on Admiralty §§ 38 at 3-26 (7th ed. rev.1998).

directing our focus to the BETTY LYN II's *practical capability* to serve as a means of maritime transportation.

D. The BETTY LYN II is a Vessel

A "case-by-case approach" is often necessary to determine whether admiralty jurisdiction applies to "novel or unusual situations." *Id.* This case warrants such an approach. Our long line of precedent demonstrates that despite her massive overhaul, the BETTY LYN II maintained her vessel status during the repair period. Neither the manner of her repair, nor the fact that the needed repairs were so extensive as to temporarily disable her, divested her of her status as a vessel. Indeed our review of the history of maritime liens demonstrates they were designed to *encourage* repairs on ships in great need. *See supra* Section III.A.

The BETTY LYN II need merely be capable of transportation on water to be a vessel. The law does not require that she be able to self-propel. *See Belle of Orleans,* 535 F.3d at 1307 (noting the "vessel" had to be towed in for repairs); *Miami River Boat Yard, Inc. v. 60' Houseboat,* 390 F.2d 596, 597 (5th Cir.1968) (holding that a houseboat is "a vessel capable of being subject to a maritime lien," as the fact that "she has no motive power and must . . . be towed does not deprive her of the status of a vessel"); *see also United States v. Templeton,* 378 F.3d 845, 850-51 (8th Cir.2004) (holding that a ship with inoperable engines

and no ability to self-propel was a "vessel" because it had *residual* navigational capacity); *Colonna's Shipyard,* 584 F.Supp.2d at 864, 872-73 (holding that a ship whose powers of self-navigation were practically irreparable and that was towed to a repair facility to be converted into an artificial reef was a vessel subject to maritime liens because it could be towed and carry a crew and cargo). In fact, it is instructive that, in addition to "repairs," the "necessaries" for which maritime liens are authorized under the Federal Maritime Lien Act specifically include towage. *See* 46 U.S.C. § 31301(4). Although she could not self-propel, the BETTY LYN II could be towed upon 24 hours notice.

Nor does the fact that the BETTY LYN II was drydocked for the repairs divest her of vessel status. *See N. Pac. S.S. Co.,* 249 U.S. at 128, 39 S.Ct. at 224 (holding that admiralty jurisdiction extended to an action for ship repairs performed in drydock, because "there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all."); *Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht,* 625 F.2d 44, 47 n. 2. (5th Cir.1980) (holding that a yacht that had been test-sailed but was placed in drydock afterward did not lose its status as a vessel merely by being drydocked). In fact, "all serious repairs upon the hulls of vessels are made in dry docks," so the "error" of

exempting ships in drydock from admiralty jurisdiction would "deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs." *Simmons v. The S.S. Jefferson*, 215 U.S. 130, 143, 30 S.Ct. 54, 58, 54 L.Ed. 125 (1909).

Neither is the extensiveness of the BETTY LYN II's overhaul so great as to virtually transform the repair work into new-ship construction, which would not be subject to admiralty jurisdiction. *See New Bedford Dry Dock Co. v. Purdy*, 258 U.S. 96, 100, 42 S.Ct. 243, 244, 66 L.Ed. 482 (1922). "[I]f any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up, is built upon, the law holds that in such a case it is the old vessel rebuilt, and not a new vessel." *Id.*

The district court held that, because the repairs Crimson Yachts performed on the BETTY LYN II were so extensive and time consuming, the BETTY LYN II lost her status as a vessel during the course of the overhaul and, thus, Crimson Yachts lost any security for its labor in the form of a maritime lien. That holding is mistaken. Congress created maritime liens to protect both ships in need of service and persons willing to provide such services. Congress could not have intended as the need for protection increased, the law's protection would retract. Thus, the maritime-lien system surely applies in scenarios such as this.

IV. CONCLUSION

Based on the facts before us, we conclude the BETTY LYN II retained a practical ability to engage in maritime transport and is, therefore, a vessel subject to maritime liens and the district court's admiralty jurisdiction. Accordingly, we reverse the district court's ruling and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

2009 WL 485074 (S.D.Ala.)

United States District Court,
S.D. Alabama,
Southern Division.
CRIMSON YACHTS, etc., Plaintiff,
v.
M/Y Betty LYN II, etc., et al., Defendants.
Civil Action No. 08-0334-WS-C.

Feb. 26, 2009.

J.W. Goodloe, Jr., Vickers, Riis, Murray & Curran, L.L.C., for Plaintiff.

Abram Lewis Philips, Jr., Burr & Forman LLP, Mobile, AL, David S. Toy, Houston, TX, for Defendants.

ORDER

WILLIAM H. STEELE, District Judge.

This matter is before the Court on the motion of defendant Blyn II Holding, LLC ("Blyn") to vacate the arrest of defendant M/Y Betty Lyn II ("Betty Lyn") and to dismiss the in rem claims against her. (Doc. 23). The parties have filed briefs and evidentiary materials in support of their respective positions, (Docs.24, 28, 37), and they presented additional evidence at the hearing conducted on the motion. After carefully considering the foregoing and other relevant material in the file, the Court concludes that the motion to vacate arrest is due to be granted.

BACKGROUND

The plaintiff, which owns a ship repair yard, entered a contract with Blyn to perform certain repairs on the Betty Lyn. She was placed under cover in the shipyard, and work began on approximately October 1, 2006. Blyn timely paid all invoices until that of March 26, 2008. The amount of unpaid invoices exceeds $600,000, which the plaintiff claims along with a 10% retainage on all work done to date. The Betty Lyn remains in the shipyard, with a good bit of work completed and a good bit more not accomplished.

DISCUSSION

"[A] person providing necessaries to a vessel on the order of the owner or a person authorized by the owner . . . has a maritime lien on the vessel." 46 U.S.C. § 31342(a). The term "necessaries" includes repairs. *Id.* § 31301(4). The plaintiff claims such a lien. (Doc. 1 at 1).

In order for a maritime lien to attach under Section 31342, the repairs must have been rendered to "a vessel." Blyn argues that the Betty Lyn was not a "vessel" at the relevant time and that, consequently, the plaintiff can have no maritime lien. Absent a maritime lien, it concludes, arrest of the Betty Lyn was improper and must be vacated. (Doc. 23 at 1-2, 9). *See Board of Commissioners v. M/V Belle of Orleans*, 535 F.3d 1299, 1314 (11th Cir.2008) ("The lien and the proceeding in rem are, therefore, correlative –

where one exists, the other can be taken, and not otherwise.") (internal quotes omitted); *Industria Nacional Del Papel, C.A. v. M/V Albert F,* 730 F.2d 622, 625 (11th Cir.1984) ("A court obtains in rem jurisdiction over a vessel when a maritime lien attaches to the vessel."). Blyn accepts that it bears the burden of persuasion. (Transcript at 4).

"The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. Section 3 "suppl[ies] the default definition of 'vessel' throughout the U.S.Code, unless the context indicates otherwise." *Stewart v. Dutra Construction Co.,* 543 U.S. 481, 490, 125 S.Ct. 1118, 160 L.Ed.2d 932 (2005) (internal quotes omitted) (applying Section 3 to the Longshore and Harbor Workers' Compensation Act ("LHWCA")). As the parties do not suggest that the context of Section 31342 indicates that some other definition of "vessel" applies, the Court utilizes that of Section 3. *See also Miami River Boat Yard, Inc. v. 60' Houseboat,* 390 F.2d 596, 597 (5th Cir.1968) (applying Section 3 to the question whether there was a vessel for purposes of 46 U.S.C. § 971, the predecessor of Section 31342); *Pleason v. Gulfport Shipbuilding Corp.,* 221 F.2d 621, 623 (5th Cir.1955) (same).

"Under § 3, a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." *Stewart,* 543 U.S. at 497. "The question remains in all cases whether the watercraft's use 'as a

means of transportation on water' is a practical possibility or merely a theoretical one." *Id.* at 496. For example, "ships taken permanently out of the water as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again." *Id.* at 494. The Betty Lyn was not taken permanently out of the water and so is not captured by this portion of *Stewart*. The Court must look further to determine if she remained practically capable of water transportation while under repair.

Jones Act and LHWCA cases require that the vessel be "in navigation."[1] This does not mean that a "vessel" under Section 3 might nevertheless not be a "vessel in navigation" under these statutes. Rather, the "in navigation" inquiry is "relevant to whether the craft is 'used, or capable of being used' for maritime transportation" as required by Section 3, because it recognizes that "structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time." *Stewart*, 543 U.S. at 496. That is, "the 'in navigation' requirement is an

---

[1] Even though the relevant section of the Jones Act does not employ the term, "vessel," Section 3 provides the definition of the term for purposes of determining who is a "seaman" under the Act. *Stewart*, 543 U.S. at 488-89 & 489 n. 1 ("seaman" status under the Jones Act is measured by the LHWCA exception for "a master or member of a crew of any vessel"); *id.* at 494 ("Applying § 3 brings within the purview of the Jones Act the sorts of watercraft considered vessels at the time Congress passed the Act.").

element of the vessel status of a watercraft." *Id.*[2] Because being "in navigation" is an element of vessel status, if a watercraft is not "in navigation," it is not practically capable of being used as a means of transportation on water and so is not a "vessel" for purposes of Section 3. The Court therefore turns to cases considering when a vessel placed under repair ceases to be in navigation.[3]

---

[2] To emphasize that being in navigation is a sine qua non of vessel status, *Stewart* cited an "in navigation" case for the proposition that the question whether a craft is practically capable of use for water transportation may involve fact issues for the jury. *Id.* (citing *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995)).

[3] Blyn characterizes the Betty Lyn as a "dead ship." (Doc. 23 at 2, 9). A "dead ship" has been described as "a ship withdrawn from navigation and marine commerce" and no longer a "vessel." *Amoco Oil v. M/V Montclair*, 766 F.2d 473, 477 (11th Cir.1985). While the term has occasionally been applied to ships that leave the water only for the purpose of repair, *see Delome v. Union Barge Line Co.*, 444 F.2d 225, 232 (5th Cir.1971), it is more commonly associated with ships laid up indefinitely and with no likelihood of a prompt return to service, as with a mothball fleet. *See, e.g., Croley v. Matson Navigation Co.*, 434 F.2d 73, 74 (5th Cir.1970); *see generally Mullane v. Chambers*, 333 F.3d 322, 328 (1st Cir.2003) (under the dead ship doctrine, "a ship loses its status as a vessel when its function is so changed that it has no further navigation function"; "[s]imply taking a vessel temporarily out of service . . . does not render it a dead ship"). The Court finds the "dead ship" terminology unhelpful and potentially problematic in the repair context presented here and employs neither the phrase nor any test for determining "dead ship" status.

"A ship and its crew do not move in and out of Jones Act coverage depending on whether the ship is . . . berthed for minor repairs. . . ." *Stewart*, 543 U.S. at 494. "At some point, however, repairs become sufficiently significant that the vessel can no longer be considered in navigation." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 374, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995).[4] "The general rule among the Courts of Appeals is that vessels undergoing repairs or spending a relatively short period of time in drydock are still considered to be 'in navigation' whereas ships being transformed through 'major' overhauls or renovations are not." *Id.* "Obviously, while the distinction at issue here is one of degree, the prevailing view is that 'major renovations can take a ship out of navigation, even though its use before and after the work will be the same.'" *Id.* (quoting *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 570 (9th Cir.1992)). As the *McKinley* Court noted, "[m]ajor overhaul or refitting of a vessel will take the vessel out of navigation." 980 F.2d at 570 (citing *West v. United States*, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed.2d 161 (1959)).

Precedent within this Circuit is consistent with these principles. Thus, whether repairs take a vessel

---

[4] *Stewart* cited *Chandris* as a case basing the "in navigation" requirement on the recognition that a vessel can lose its character as such if removed from the water for an extended time. 543 U.S. at 496. *Stewart* carries no hint that *Chandris*' test for applying the "in navigation" requirement to repair situations is no longer the correct one under Section 3, and the plaintiff makes no argument to the contrary.

out of navigation depends on "the extent of the repair operations and on who controls those operations." *Waganer v. Sea-Land Service, Inc.*, 486 F.2d 955, 958 (5th Cir.1973) (internal quotes omitted). The extent of the repair operations focuses on "whether the contracted work is minor or major," with major work including such things as "structural changes, alterations in the hull, [and] major overhauling." *Id.* Thus, where the vessel's "engines, generators, boilers and pumps were dismantled," power had been cut off, her crew was gone, and she could be moved only by tug, the vessel "was undergoing a major overhaul" and the trial court properly found she was not in navigation. *Erwin v. Lykes Brothers Steamship Co.*, 472 F.2d 1217, 1219 (5th Cir.1973). Likewise, where the vessel "underwent an extensive overhaul" that included "both structural changes and regular maintenance," costing over $600,000 and lasting 77 days, the trial court properly ruled as a matter of law that the vessel was not in navigation. *Hodges v. S.S. Tillie Lykes*, 512 F.2d 1279, 1280 (5th Cir.1975).

Under these authorities, there is no question but that the Betty Lyn was not in navigation, and thus was not a "vessel" under Section 3, at any relevant time.

The Betty Lyn is a 132-foot yacht built in 1974 and thus 32 years old when the work at issue began. Before being towed to the plaintiff's shipyard, her engines and much of her equipment were removed. The scope of the work undertaken by the plaintiff included at least the following:

- Removing all remaining machinery, equipment, furnishings, electronics, wiring, plumbing, windows and doors, stripping the craft bare

- Replacing the existing three engines with two more powerful engines

- Sealing the center shaft rendered unnecessary by the two new engines, making it part of the hull

- Creating two new shaft lines or tunnels to accommodate the two new engines, which required cutting through the hull

- Recessing the propeller into the bottom of the hull

- Cutting through the hull to install port and starboard stabilizers

- Adding a skeg/keelson along the external center line

- Putting a newer bottom on the hull

- Extending the fuel tank on the transom

- Replacing the two generators

- Modifying a forward engine room bulkhead

- Removing and reinstalling joiner bulkheads

- Extending the sun decks

- Installing teak decking on all exterior decks

- Replacing teak cap rail
- Raising the wheelhouse one foot
- Replacing the AC, refrigeration and ventilation systems
- Replacing the windlass, ground tackle, rudders and all running gear
- Replacing the sea valves and all associated plumbing
- Replacing all electronics and navigational equipment, including GPS, radar, fathometers, radios, depth sounders, and navigational lights
- Replacing all life rafts, emergency position indicating radio beacon, signaling gear, and firefighting equipment
- Replacing tender and crane/davit system
- Replacing all electrical wiring, panels and associated systems
- Replacing all plumbing, pumps and sanitation systems
- Replacing all doors, windows and portholes
- Replacing all interior furnishings, soft goods and appliances

- Removing all paint and completely fairing, below and above the waterline

(Goff Affidavit at 2; Short Affidavit at 6-7; Transcript at 23, 30, 33, 50, 57-58, 62, 67).[5]

In the face of this exhausting yet non-exhaustive listing, it can scarcely be argued that the scope of work does not reflect "major work" sufficient to take the Betty Lyn out of navigation. Indeed, the plaintiff's president admitted that the work constituted a "major overhaul," "major refurbishment," "major outfitting," and "major rehabilitation." (Transcript at 72). The Court agrees and so finds.

The plaintiff is not aided by a consideration of who controlled the repair operation. As a threshold matter, there is some question as to whether this is a legitimate consideration when, as here, the issue is not whether the owner owes a duty to furnish a seaworthy vessel or to exercise reasonable care. This appears to be the primary if not sole context in which matters of control are addressed in the caselaw. Moreover, in *Chandris* the Court indicated that the scope of the work alone can remove a vessel from navigation as a matter of law. 515 U.S. at 375; *see also McKinley*, 980 F.2d at 571 (at least when the repairs are so extensive as to constitute a conversion,

[5] Blyn's witness testified that the work called for the hull to be extended seven feet. (*Id.* at 50). The plaintiff's president denied this. (*Id.* at 57). For present purposes, the Court finds that extending the hull was not part of the work.

the vessel is not in navigation even though the owner controls the repairs).

At any rate, the Court finds that Blyn was not in control of the repair operation. The plaintiff stresses that Blyn maintained an on-site representative during the project, who was at the shipyard throughout most weekdays and was regularly consulted by the plaintiff's management concerning matters of price, change orders, and "things [that] come up" during a refit. (Short Affidavit at 7-8; Transcript at 65). It is hardly surprising that the owners of a vessel undergoing several millions of dollars of work pursuant to a major overhaul would keep a representative on site to protect their interests, but this routine and prudent step does not show that the owners controlled the repair operation. *See, e.g., United States v. West,* 361 U.S. 118, 119-20, 80 S.Ct. 189, 4 L.Ed.2d 161 (1959) (ship representatives who remained on board as inspectors of the work "had no control of the ship in the ordinarily accepted context") (internal quotes omitted); *Hodges,* 512 F.2d at 1280 (where vessel representatives remained aboard to watch the ship and provide access but had no supervisory power over the workers, the owner did not control the operations); *Johnson v. Oil Transport Co.*, 440 F.2d 109, 113 (5th Cir.1971) (owner's representative, whose function was to order or authorize various items of repairs and to approve the work upon completion, was not in control of the repairs). Because the unexpected does occur on large remodeling projects (ask any homeowner), the owner must be consulted about how to

proceed, and it must approve alterations in the price or scope of work required by new circumstances or the owner's change of mind. That this is accomplished by one on-site (and thus in the best position to appreciate the situation and respond on the owner's behalf), rather than by telephone calls to and from a distant state, can be of no moment.

In summary, the Court finds that the Betty Lyn, who was undergoing major repairs not controlled by her owners, was not in navigation.[6]

The plaintiff makes several attempts to neutralize this finding. Without acknowledging *Stewart,* it first argues that a vessel need not be "in navigation" in order to satisfy Section 3. (Doc. 28 at 13). As discussed above, *Stewart* makes clear that the "in navigation" requirement "is an element of vessel status" under Section 3. 543 U.S. at 496. The plaintiff's reliance on *Pleason* for its argument is unexplained and apparently unfounded. It is true that *Pleason,* in discussing Section 3, did not advert to an "in navigation" element, but neither did it deny the existence of such a requirement. Even if *Pleason* could be read as the plaintiff wishes, it could not survive *Stewart's* express description of being "in

[6] Because the Court does not rely on the challenged portions of his affidavit in making this finding, the plaintiff's motion to strike portions of the affidavit of Alan D. Goff, (Doc. 30), is **denied as moot**.

navigation" as "an element" of vessel status under Section 3.

The plaintiff next cites *Stewart* for the proposition that "being 'lodged in a drydock or shipyard' does not change a vessel's identity [as a vessel] – as long as it can 'again be put to sea.'" (Doc. 28 at 15 (quoting *Stewart*, 543 U.S. at 496)). While *Stewart* did acknowledge the obvious – that "[a] ship long lodged in a drydock or shipyard can again be put to sea" – it did not state or suggest that, this being the case, such a ship never loses vessel status under Section 3. On the contrary, the very next sentence of *Stewart* states, "[t]he question remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Id.* The answer to that question depends on whether, given the scope of repairs (and, perhaps, who controlled them), the vessel remains "in navigation" while in drydock or shipyard.

The plaintiff also complains that distinguishing ordinary repair from major renovations is an exercise so fraught with difficulty as to be impossible to perform. (Doc. 28 at 13-14). Whatever its imprecision, this is the test that the Supreme Court in *Stewart* and *Chandris*, and the Eleventh Circuit in *Waganer*, *Erwin* and *Hodges*, have adopted, and it is not given to the plaintiff, or this Court, to ignore it because it violates some aesthetic or other sensibility. Nor, as discussed above, is its application to the facts of this case at all ambiguous.

As a corollary, the plaintiff questions a test under which a ship loses vessel status "at some magic undefined moment during the progress of the work." (Doc. 28 at 14-15). The Court has been presented with no authority for the unlikely proposition that a vessel undergoing major repairs in a shipyard remains in navigation until some threshold quantity of work is completed.[7] If the work is major as defined above, the vessel leaves navigation no later than when the repairs commence.[8]

The plaintiff next suggests that, although the work on the Betty Lyn ended up as a major overhaul, it didn't start out that way and became a major overhaul only by the accretion of 37 change orders. (Transcript at 71-72). The evidence will not support that proposition. The change orders added $1.6 million to the total cost of the project, which was an increase of 35% above the original price. (*Id.* at 61-62). That means the original cost of the project was over $4.5 million, and the plaintiff has not offered to

---

[7] Although unnoted by the plaintiff, the Court is aware of a line of cases indicating that a "dead ship" may assume vessel status at the commencement, not the conclusion, of repairs to ready her for a return to service. *See Colonna's Shipyard, Inc. v. U.S.A.F. General Hoyt S. Vandenberg*, 584 F.Supp.2d 862, 871-72 (E.D.Va.2008) (collecting cases). That cannot be so in the Eleventh Circuit, where major repairs take a vessel out of navigation, not into it.

[8] That the Betty Lyn was towed to the shipyard and thus was in navigation at that point does not, contrary to the plaintiff's insistence, (Doc. 28 at 14), establish or even suggest that she remained in navigation once repairs began.

explain how such a huge project could avoid constituting a major repair job.[9] Moreover, even as originally envisioned, the work was anticipated to take 15 months, (Short Affidavit at 3), which of itself indicates major repair. *See Chandris,* 515 U.S. at 374-75 (while six months "is a relatively short period of time for important repairs on oceangoing vessels," the 17 months involved in *McKinley* is not). But the clincher is the plaintiff's admission that, from the outset, the work was "to completely overhaul and refurbish" the Betty Lyn. (Short Affidavit at 2). The Court finds that the work constituted a major overhaul from the first.[10]

The plaintiff presents a number of appellate cases concluding under various circumstances that a vessel existed. (Doc. 28 at 4-10). None of them, however, addressed the status of a ship while undergoing

---

[9] The Betty Lyn is subject to a preferred ship mortgage of $6 million, (Short Affidavit at 5), and the original project cost exceeds 75% of that amount.

[10] Even had the plaintiff established that the job only evolved into a major overhaul, it would still lose. The plaintiff admits that Blyn paid all invoices from 2006 all the way until March 2008. (Short Affidavit at 5). By that time, most if not all of the change orders had been made, and the project was a major overhaul even by the plaintiff's standards. A maritime lien "subsist[s] from the moment the debt arises." *Dresdner Bank AG v. M/V Olympia Voyager,* 465 F.3d 1267, 1272 (11th Cir.2006) (internal quotes omitted). Because the debt which the plaintiff seeks to secure arose after even it admits a major overhaul existed, the Betty Lyn was out of navigation and no maritime lien could arise to secure that debt.

repairs,[11] and so none impacts the analysis set forth above.

Finally, the plaintiff finds it critical that the Betty Lyn would not sink were it given 24 hours to make her watertight. (Doc. 28 at 16).[12] Although the majority of the evidence presented at the hearing was directed to the parties' respective positions on this point, no case brought to the Court's attention indicates in the slightest that whether a ship under repair is practically capable of water transportation is to be determined in such a fashion. On the contrary, *Stewart* made clear that it rejects any "'snapshot' test." 543 U.S. at 495. As discussed above, whether a ship under repair has lost its status as a Section 3

---

[11] The Belle of Orleans underwent repairs after Hurricane Katrina, but the question presented was her status prior to the repair, when she was tied along the Louisiana shore. 535 F.3d at 1312. The plaintiff in *Pleason* asserted a maritime lien for repair services, but the Court addressed vessel status only before and after the repairs, not during them. 221 F.2d at 623. The houseboat in *Miami River Boat Yard* underwent repair (while resting in the water), but the opinion addresses only its status before, and perhaps after, the repairs. 390 F.2d at 597. The vessel in *M/V Marifax v. McCrory*, 391 F.2d 909 (5th Cir.1968), underwent repair, but the Court considered only whether its immediately preceding 15 year "desuetude" prevented it from being a vessel. *Id.* In *Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht*, 625 F.2d 44 (5th Cir 1980), the Court stated only that it knew of no authority for the proposition that placing a new vessel in dry storage for three months deprives it of vessel status. *Id.* at 47 n. 2.

[12] Blyn finds it equally important that she would sink if put in the water in her present condition. (Doc. 37 at 2).

vessel turns on whether it remains "in navigation" during the repairs, and that question is answered by the scope of the repairs, not by whether at some point during them the ship would or would not sink if placed in water.

CONCLUSION

For the reasons set forth above, the Court finds that the Betty Lyn was not in navigation and thus was not a vessel against which a maritime lien could arise. Accordingly, Blyn's motion to vacate arrest and to dismiss the in rem claims against the Betty Lyn is **granted**. The in rem claims against the Betty Lyn alleged in the First Cause of Action of the complaint are **dismissed**. The arrest of the Betty Lyn is **vacated**, and the plaintiff's appointment as substitute custodian is rescinded.

DONE and ORDERED.

No. 09-1514

In The
Supreme Court of the United States

BETTY LYN II, Motor Yacht, Official No. 55036, in rem, and BLYN II HOLDING, LLC, a Texas Limited Liability Company, in personam,

Petitioner,

vs.

CRIMSON YACHTS, an unincorporated division of Horizon Shipbuilding, Inc., an Alabama Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

J. W. GOODLOE, JR.
Counsel of Record
ROY W. HARRELL, III
VICKERS, RIIS, MURRAY AND CURRAN, L.L.C.
56 St. Joseph Street,
11th Floor
Post Office Drawer 2568
Mobile, Alabama 36652
(251) 432-9772 Telephone
(251) 432-9781 Facsimile
bgoodloe@vickersriis.com

Attorneys for Respondent, Crimson Yachts

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Eleventh Circuit's careful analysis of the controlling law in its opinion reversing the District Court does not conflict with a decision of this Court, or a court of appeals, and where Petitioner does not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. The Eleventh Circuit Court of Appeals reversed a ruling of the United States District Court for the Southern District of Alabama which held that a yacht undergoing major repairs at a shipyard was not a vessel subject to the admiralty jurisdiction of the Court and that, therefore, the shipyard was not entitled to assert a maritime lien. Accordingly, the question presented is whether a watercraft which is used or capable of being used as a means of transportation on water loses its status as a "vessel" under 1 U.S.C. § 3 upon commencement of major repairs at a shipyard.

PARTIES TO THE PROCEEDING

Petitioner's recitation with respect to the parties to the proceeding is correct.

RULE 29.6 DISCLOSURE STATEMENT

Horizon Shipbuilding, Inc., an Alabama corporation, which operates an unincorporated division known as Crimson Yachts, has no parent corporation and is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns 10% or more of the corporate stock of Horizon Shipbuilding, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Rule 29.6 Disclosure Statement	iii
Table of Contents	iv
Table of Authorities	v
Introductory Statement	1
Reasons for Denying the Petition	2
I. *Stewart* is a Clear Enunciation of the Law and its Citation to *Chandris* Does Not Engraft "In Navigation" as an Indispensable Requirement of the Definition of the Word "Vessel"	2
II. The Seaworthiness Cases Cited by Petitioner are Inapplicable Because "In Navigation" is Essential to a Personal Injury Case Invoking the Warranty of Seaworthiness	11
III. The Dead Ship Doctrine Does Not Apply Because the BETTY LYN Ii's Use as a Means of Transportation on Water Existed When it Arrived at the Shipyard and the Onset of Repairs to Improve its Condition Did Nothing to Transform it into a Dead Ship	14
Conclusion	20

TABLE OF AUTHORITIES

Page

CASES

Amoco Oil v. M/V Montclair, 766 F.2d 473 (11th Cir. 1985) 15

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) 2, 4, 5, 8

Colonna's Shipyard, Inc. v. U.S.A.E. General Hoyt S. Vandenberg, 584 F. Supp. 2d 862 (E.D. Va. 2008) 13

Crimson Yachts v. BETTY LYN II Motor Yacht, 603 F.3d 864 (11th Cir. 2010) 9, 10, 20

Delome v. Union Barge Line Co., 444 F.2d 225 (5th Cir. 1971) 17, 18

Dresdner Bank AG v. M/V Olympia Voyager, 465 F.3d 1267 (11th Cir. 2006) 17

Erwin v. Lykes Brothers Steamship Co., 472 F.2d 1217 (5th Cir. 1973) 11

Hercules Co. v. The Brigadier General Absolom Baird, 214 F.2d 66 (3rd Cir. 1954) 15

Hodges v. S. S. Tillie Lykes, 512 F.2d 1279 (5th Cir. 1975) 11

Johnson v. Oil Transport Company, Inc. 440 F.2d 109 (5th Cir. 1971) 12

New England Fish Co. v. Barge or Vessel Sonya, 332 F. Supp. 463 (D.C. Alaska 1971) 6, 7

TABLE OF AUTHORITIES – Continued

Page

North Pacific Steamship Company v. Hall Brothers Marine Railway & Shipbuilding Company, 249 U.S. 119 (1919) 9, 10, 11

Robert E. Blake Inc. v. Excel Environmental, 104 F3d 1158 (9th Cir. 1997).....18

Roper v. United States, 368 U.S. 20 (1961).....4, 12, 16, 17

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).....11

Stewart v. Dutra Const. Co., 543 U.S. 481 (2005).....*passim*

Waganer v. Sea-Land Service, Inc., 486 F.2d 955 (5th Cir. 1973).....11

West v. United States, 361 U.S. 118 (1959).....4, 12, 13, 18

STATUTES

1 U.S.C. § 3 .....*passim*

46 U.S.C. § 31342(a)(2).....1

OTHER AUTHORITIES

Bull, 6 U.S.F. Mar. L.J. 5

T. J. SCHOENBAUM, ADMIRALTY & MARITIME LAW (3d ed. 2001).....12

INTRODUCTORY STATEMENT

The Eleventh Circuit Court of Appeals was correct in determining that the BETTY LYN II was a vessel subject to admiralty jurisdiction and the maritime lien for necessaries, 46 U.S.C. § 31342(a)(2), and the opinion is straightforward, logical and does nothing to confuse or create inconsistency in the law as Petitioner asserts. The word "vessel" is defined in 1 U.S.C. § 3 as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." This Court held in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005) that this definition is a codification of the general maritime law and provides the correct definition of "vessel" throughout the United States Code, unless the context indicates otherwise. 543 U.S. at 489-90.

Stewart further held that "[s]ection 3 requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel," 543 U.S. at 495, and that the focus of inquiry is the craft's capability, not its present use or station, 543 U.S. at 497. *Stewart* further noted that "a ship being lodged in a drydock or shipyard can again be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail," and held that "[t]he question remains in all cases whether the watercraft's use as a means of transportation on water is a

practical possibility or merely a theoretical one." 543 U.S. at 496.

Despite *Stewart's* instruction that the words of the statute must be given their "ordinary and natural" meaning and its acknowledgment that this definition "sweeps broadly," 543 U.S. at 494, Petitioner would have this Court severely restrict the broad statutory definition of 1 U.S.C. § 3 by engrafting an "in navigation" requirement to it in maritime lien cases.

REASONS FOR DENYING THE PETITION

Petitioner suggests three reasons why this Court should grant the writ, but none of them are supported by the applicable law and none are persuasive.

1. *STEWART* IS A CLEAR ENUNCIATION OF THE LAW AND ITS CITATION TO *CHANDRIS* DOES NOT ENGRAFT "IN NAVIGATION" AS AN INDISPENSABLE REQUIREMENT OF THE DEFINITION OF THE WORD "VESSEL"

The first reason advanced by Petitioner is that, by the citation to *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) in *Stewart*, an indispensible "in navigation" requirement must be read into the statutory definition. Being unable to point to any clear mandate in the language of the opinion, Petitioner finds it necessary to dilute this argument with the assertion

that *Stewart* represents a "subtle change" in the law. (Petition, p. 13.)

Stewart did not change the law, subtle or otherwise. The appeal in *Stewart* was from the First Circuit, which erroneously held that a dredge was not a vessel because its primary purpose was not navigation or commerce and because it was not in actual transit at the time of the plaintiff's injury. 543 U.S. at 495. This Court said:

> Neither prong of the Court of Appeals test is consistent with the text of § 3 or the established meaning of the term "vessel" in general maritime law.
>
> Section 3 requires only that a watercraft be "used, or capable of being used, as a means of transportation on water" to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose.

543 U.S. at 495 (italics by the Court) (internal citations omitted).

> Further explaining the First Circuit's error, *Stewart* stated:
>
> Granted, the Court has sometimes spoken of the requirement that a vessel be "in navigation," *id.*, *at* 373-374, 115 S.Ct. 2172, but never to indicate that a structure's locomotion at any given moment mattered. Rather, the point was that structures may lose their character as vessels if they have been withdrawn from the water for extended

> periods of time. *Ibid.*; *Roper v. United States*, 368 U.S. 20, 21, 23, 82 S.Ct. 5, 7 L.Ed.2d 1 (1961); *West v. United States*, 361 U.S. 118, 122, 80 S.Ct. 189, 4 L.Ed.2d 161 (1959)

543 U.S. 481, 496. *Stewart* then stated:

> [T]he "in navigation" requirement is an *element* of the vessel status of a watercraft. It is *relevant* to whether the craft is "used, or capable of being used" for maritime transportation. A ship long lodged in a drydock or shipyard can again be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. *The question remains in all cases whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one.*

Id. (italics added).

Chandris was a personal injury case under the Jones Act, and it discusses the employment-related connection a worker must have to a vessel in order to qualify as a seaman under the Jones Act. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 349-50 (1995). After a lengthy discussion about seaman status, this Court said, "The foregoing discussion establishes that, to qualify as a seaman under the Jones Act, a maritime employee must have a substantial employment-related connection to a vessel *in navigation*." 515 U.S. 347, 373 (underlining added, italics in original)

To the extent that the Court or Petitioner desires a uniform definition of "vessel" to apply throughout general maritime law, that definition is espoused in 1 U.S.C. § 3 and it applies to every aspect of the U.S. Code, unless the context dictates otherwise as stated in *Stewart* and noted above. 543 U.S. at 489-490. The citation to *Chandris*, in short, has nothing to do with any intention to fashion a uniform definition of the term vessel that applies to all areas of maritime law. Indeed, *Chandris* only addressed one area of maritime law –

> This case asks us to clarify what "employment-related connection to a vessel in navigation," *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355, 111 S.Ct. 807, 817, 112 L.Ed.2d 866 (1991), is necessary for a maritime worker to qualify as a seaman under the Jones Act, 46 U.S.C.App. § 688(a). In *Wilander*, we addressed the *type* of activities that a seaman must perform and held that, under the Jones Act, a seaman's job need not be limited to transportation-related functions that directly aid in the vessel's navigation. We now determine what *relationship* a worker must have to the vessel, regardless of the specific tasks the worker undertakes, in order to obtain seaman status.

Chandris, Inc. v. Latsis, 515 U.S. 347, 350 (1995).

Moreover, *Chandris* at 374, cites a legal journal's collection of cases, Bull, 6 U.S.F. Mar. L.J., at

582-584, for its proposition that extensive repairs may take a vessel out of navigation. Not surprisingly, all of those cases, save one – *New England Fish Co. v. Barge or Vessel Sonya*, 332 F. Supp. 463 (D.C. Alaska 1971), are personal injury cases which undergo the same evaluation of "in navigation" status for the same reasons – namely to determine the duty owed and the remedy available in a personal injury case.

In *New England Fish Co.*, a preferred ship mortgage was foreclosed and the vessel sold to satisfy the mortgage. 332 F. Supp. at 464. Certain parties intervened to make claims upon the proceeds, including crew members of the vessel who made a claim for unpaid wages. The court borrowed the definition of seaman from Jones Act cases and then held that the wages in question were not the wages of a crew of a vessel, as would be necessary to prime a preferred ship mortgage, because the vessel was not in navigation at the time of her arrest (she was being used to store fish and her owners had no intention of returning her to service) and the supposed crew were not doing work which required the skill of seaman. *Id. at* 467-469. Among the other intervenors mentioned in the decision were Kodiak Oil Sales, Inc. and Nakat Packing Corporation, who asserted a lien for fuel furnished to the vessel. Although the decision never mentions what happened to these claims, other than an acknowledgment that the court had admiralty jurisdiction to hear claims for maritime liens, it did speak to the issue of maritime liens for necessaries, albeit under the older code sections then in

effect before the re-organization that took place in 1975:

> "Vessel" is also defined in 1 U.S.C.A. § 3: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water." This broader definition of vessel is generally applied to statutory liens for supplies and repairs under 46 U.S.C.A. § 971 (1958). *See Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955). *See generally* Annotation, What is a "Vessel" Subject to a Maritime Lien under 46 U.S.C.A. § 971, 3 A.L.R.Fed. 882. The term crew when used in conjunction with the word vessel, however, connotes a vessel still actively plying the seas. Thus, a vessel may be subject to some maritime liens but not others. For example, repairmen working aboard a vessel temporarily laid up for repairs would not be considered seamen for purposes of the Jones Act, although the policies behind 46 U.S.C.A. § 971 would still be applicable. Although this may create some anomalous situations where the ship has been more or less permanently withdrawn from navigation (*compare Pleason v. Gulfport Shipbuilding Corp.*, *supra*, which is indistinguishable from the present case, except that the liens arose under § 971). The definition of a "crewmember" as a "seaman *** on a vessel in navigation," *The Herdis*, *supra*, is well established.

332 F. Supp. 463, 467 (D.C. Alaska 1971).

Thus we see a case in the law review article referenced in the portion of *Chandris* cited by *Stewart* (all cited by the Petitioner herein), which clearly states, just as the Eleventh Circuit held in this matter, that 1 U.S.C. § 3 provides the definition of a vessel in connection with a maritime lien for necessaries. This serves to underscore that the only confusion resides in the mind of Petitioner, as opposed to a conflict among the circuits, or a conflict between the Eleventh Circuit and this Court, or general confusion among the entities engaging in maritime commerce.

The Eleventh Circuit did not ignore *Stewart* or its statement that whether a vessel is "in navigation" is relevant to a determination of its practical ability to navigate. Rather it correctly explained why this relevant factor does not completely and solely control the issue at hand – whether the BETTY LYN II was a vessel subject to a maritime lien and the district court's admiralty jurisdiction:

> The district court relied on *Stewart* for the proposition that a watercraft taken out of navigation is no longer a vessel. *Stewart* does mention that a ship's navigational status is "relevant" to whether it is practically capable of transportation on water. 543 U.S. at 496, 125 S.Ct. at 1128. The Court does not, however, *require* that a ship be "in navigation" to

> be considered a "vessel" for purposes of 1 U.S.C. § 3.[FN6]
>
> FN6. Benedict on Admiralty succinctly states the conclusion compelled by precedent and a review of the intent behind the maritime lien system: "[T]here is no reason why a vessel which has been withdrawn from navigation but which is still technically capable of being used in navigation should escape the provisions of the [Federal Maritime Lien Act]". 2 Benedict on Admiralty §§ 38 at 3-26 (7th ed. rev.1998).
>
> As we have discussed, *Stewart* decided whether a worker on a floating dredge was a seaman. *Stewart* did not decide whether a ship taken out of the water for extensive repairs was a vessel. *Stewart's* holding, thus, does not decide the issue before us. Rather, we must decide this case by looking at its distinct factual circumstances and their legal implications. *Nehring v. S.S. M/V Point Vail*, 901 F.2d 1044, 1050 (11th Cir.1990). *Stewart* simply reinforces our precedent, directing our focus to the BETTY LYN II's *practical capability* to serve as a means of maritime transportation.

Crimson Yachts v. BETTY LYN II Motor Yacht, 603 F.3d 864, 874-75 (11th Cir. 2010).

Before moving on to Petitioner's second stated basis for review, we must address its call for this Court to overturn *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 129

(1919). At p. 18, Petitioner asserts that the Eleventh Circuit "relied heavily" on *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 129 (1919). The Eleventh Circuit stated,

> Nor does the fact that the BETTY LYN II was drydocked for the repairs divest her of vessel status. *See N. Pac. S.S. Co.*, 249 U.S. at 128, 39 S.Ct. at 224 (holding that admiralty jurisdiction extended to an action for ship repairs performed in drydock, because "there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all.").

Crimson Yachts v. BETTY LYN II Motor Yacht, 603 F.3d 864, 875 (11th Cir. 2010). This reference could hardly be characterized as heavy reliance. Further, the use of a drydock has never been seriously argued by any party or judge in this matter as controlling the status of the BETTY LYN II as a vessel. Petitioner then states that *North Pac. S.S. Co.* is chiefly distinguishable because this "1919 direct appeal arose out of the furnishing of services and necessaries to a vessel." Horizon asserts that the case at bar, too, arose out of the furnishing of services and necessaries to a vessel. Indeed, Petitioner wants the Eleventh Circuit's decision reviewed in hopes that the BETTY

LYN II will somehow lose its vessel status. *North Pac. S.S. Co.* did nothing more than repeat a long standing view in maritime law – contracts to build a vessel are not maritime in nature while contracts to repair a vessel are maritime. It does nothing to support Petitioner's argument.

II. THE SEAWORTHINESS CASES CITED BY PETTIONER ARE INAPPLICABLE BECAUSE "IN NAVIGATION" IS ESSENTIAL TO A PERSONAL INJURY CASE INVOKING THE WARRANTY OF SEAWORTHINESS

The second reason advanced by Petitioner for granting the writ is based upon three Fifth Circuit cases that allegedly support the premise that "in navigation" is an essential component of vessel status in repair situations. (Petition, pp. 19-25.)

The three Fifth Circuit cases relied upon, *Waganer*, *Erwin*, and *Hodges*,[1] are personal injury cases that involved shore based workers who were on board ship during repair operations and were alleged to be performing work traditionally done by seaman – known as *Sieracki* seaman.[2] The issue in each case involved

---

[1] *Waganer v. Sea-Land Service, Inc.*, 486 F.2d 955 (5th Cir. 1973); *Erwin v. Lykes Brothers Steamship Co.*, 472 F.2d 1217 (5th Cir. 1973); and *Hodges v. S. S. Tillie Lykes*, 512 F.2d 1279 (5th Cir. 1975).

[2] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

whether or not the warranty of seaworthiness was breached, which turned on the question of whether or not the vessel was in navigation – as a vessel owner owes no duty of seaworthiness unless the vessel is in navigation.[3] Further, all three of these decisions relied primarily upon two seaworthiness opinions from this Court, notably *West v. United States*, 631 U.S. 118 (1959) and *Roper v. United States*, 368 U.S. 20 (1961). None of these five cases are controlling herein for three reasons: (i) none of them discuss admiralty jurisdiction or the definition of a vessel; (ii) none involved the maritime lien for necessaries; and (iii) all were decided prior to *Stewart* and focused primarily on whether the vessels were in navigation. Unlike the jurisdictional question of whether a watercraft is a "vessel," a question that must be answered objectively without regard to the ship's motion at any particular time or the ship's primary use or the owner's intended use, the warranty of seaworthiness is an "implied warranty that the vessel is reasonably fit for its intended purpose" at the time the person was injured. T. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 3.9 (3d ed. 2001). It should be noted that in each of these cases there was no holding that the court lacked jurisdiction, only that there was no warranty of seaworthiness because the vessel at issue was not in navigation and did not represent itself as

[3] "In-navigation status" is "essential" to the warranty of seaworthiness, a principle which is "self evident." *Johnson v. Oil Transport Company, Inc.*, 440 F.2d 109, 111 (5th Cir. 1971).

having operable equipment at the time of the injury. A warranty of seaworthiness is implied when a ship is being used in navigation and this warranty may not survive even a temporary withdrawal from navigation for major repairs because the withdrawal from navigation signals the termination of the implied warranty. *West v. United States*, 361 U.S. at 122.

Before moving on to Petitioner's third reason for review, an error in the Petition should be noted. At page 20, Petitioner states in footnote 14 "*See and compare Colonna's Shipyard, Inc. v. USAF General Hoyt S. Vandenberg*, 584 F. Supp. 2d 682[sic], 871-72 (E.D. Va. 2008) (recognizing that in the Eleventh Circuit, 'major repairs take a vessel out of navigation, not into it.)" Aside from the error in citation (682 should have been 862), this footnote should be disregarded because it is manifestly inaccurate. The quoted language is not found in *Colonna's Shipyard*. That quote instead comes from footnote 7 of the Order of the United States District Court for the Southern District of Alabama. (Petition, App. 38.) That order, of course was reversed by the Eleventh Circuit, thus leading Petitioner to ask this Court to review the Eleventh Circuit's decision. Notably, the Southern District did not cite any authority for the proposition in its footnote 7 and Petitioner cites no authority for the quote in its footnote 14 either, other than a case which does not contain the cited language.

III. THE DEAD SHIP DOCTRINE DOES NOT APPLY BECAUSE THE BETTY LYN II'S USE AS A MEANS OF TRANSPORTATION ON WATER EXISTED WHEN IT ARRIVED AT THE SHIPYARD AND THE ONSET OF REPAIRS TO IMPROVE ITS CONDITION DID NOTHING TO TRANSFORM IT INTO A DEAD SHIP

The third reason advanced by Petitioner for granting the writ is an alternative one – that even if the BETTY LYN II was a "vessel" within the statutory definition of the term, it became a "dead ship" removed from navigation. (Petition, 25.) If the dead ship doctrine still exists, it may only exist within the framework of the statutory definition – as the "question remains in all cases whether the watercraft's use as a means of transportation on water is a practical possibility or merely a theoretical one." *Stewart*, 543 U.S. at 496. This is obviously why neither the District Court nor the Eleventh Circuit relied upon the dead ship doctrine and casts doubt upon the need to review the Eleventh Circuit's ruling. Where is the asserted error justifying review? Not only that, we are unaware of any dead ship case where a vessel was towed to a shipyard to be improved and then made a dead ship at some point during the repair process. Petitioner has certainly not cited this Court to any such case. Illogic is created when one considers that a ship which was undeniably a vessel when it arrived at a shipyard could thereafter become a dead ship and lose its practical capability of being used as a means of transportation

on water, simply because the shipyard is instructed to transform the vessel into a luxury charter yacht.

The first case cited by Petitioner in support of the "dead ship" doctrine is *Amoco Oil v. M/V Montclair*, 766 F.2d 473, 477 (11th Cir. 1985). (Petition, pp. 25-26.) While *Amoco Oil* does state "A 'vessel' is subject to a maritime lien. A 'dead ship' is not," the court further clarified that "[t]here is no statutory definition of a dead ship," and made clear that it was "not attempting to set out a definition of a dead ship which would fit every occasion." *Id. at* 477. Rather the court simply held "that the Barge OCEAN STATES was a vessel and subject to a maritime lien under the facts in this case." *Id. at* 477-78. Interestingly, the *Amoco* Court relied upon *Hercules Co. Inc. v. The Brigadier General Absolom Baird,* 214 F.2d 66, 69 (3rd Cir. 1954), where "the Third Circuit drew a distinction between a 'dead ship' and a 'vessel' stating that where a ship was not properly documented and was not able to sail, but efforts of everyone concerned were bent on readying her for a sealing voyage, the ship was not a 'dead ship, that is, a ship withdrawn from navigation and marine commerce, but was a vessel' subject to admiralty jurisdiction in libel *in rem* to assert a maritime lien for repairs." *Amoco Oil v. M/V Montclair*, 766 F.2d 473, 477 (11th Cir. 1985) *citing Hercules Co. Inc.* Although, the BETTY LYN II was by no means dead when she arrived at the shipyard, the efforts of everyone concerned with the BETTY LYN II were to refurbish her to luxury yacht

status and thus prepare her service as a charter yacht.

Although discussed with respect to Petitioner's second reason, Petitioner also cites to *Roper v. United States*, 368 U.S. 20 (1961). (Petition, p. 25.) *Roper* concerned a liberty ship that was deactivated and mothballed in 1945. *Id. at* 21. "[H]er supplies, stores, nautical instruments, cargo gear and tackle were removed; her pipes and machinery were drained and prepared for storage; and her rudder, tail shaft and propeller were secured," and as a result of this work, "the ship lost her Coast Guard safety certification as well as her license to operate, both of which were requisite to a vessel in navigation." *Id.* In 1956, the U.S. government decided to use the ship to store grain, but it was "not reactivated for navigation nor used for transportation purposes, but was utilized solely as [a granary] for the storage of the Government's grain. In 1956, while grain was being unloaded from the ship, a longshoreman was injured and he filed suit based on unseaworthiness. The trial court dismissed the unseaworthiness claim, finding that the vessel was not in navigation, and the appellate court affirmed. This Court, noting that nothing had changed the status of the ship since it was mothballed and deactivated in 1945 (i.e., it was not converted to a self-propelled, self directed cargo ship, prepared for use as a barge or converted to any navigational use), held that it could not "say as a matter of law that the S. S. Harry Lane had been converted into a vessel in navigation, and that the

findings of the trial court were clearly erroneous." *Id. at* 23. Accordingly, this case, which does not speak to the vessel status of a watercraft against which a maritime lien for necessaries is sought, is clearly distinguishable. Moreover, the BETTY LYN II was never mothballed or de-activated, much less for a decade. On the contrary, it was towed to the shipyard so that it could be refurbished and made a luxury yacht. The facts in *Roper*, not to mention the law, bear no similarity to the instant matter and are inapplicable. Further, a maritime lien arises at the point repairs commence.[4] There can be little doubt that the BETTY LYN II was a vessel, as opposed to a "dead ship" and thus subject to a maritime lien, at the time the maritime lien for necessaries arose. As noted by the District court herein, "the Betty Lyn was towed to the shipyard and thus was in navigation at that point." (Petition, p. 38.)

Petitioner next cites to *Delome v. Union Barge Line Co.*, 444 F.2d 225 (5th Cir. 1971), (Petitioner's Brief, p. 25), which concerned a shipfitter's suit for unseaworthiness arising out of an injury that occurred while a barge was hauled up on a marine railway. *Id. at* 226. Although, the Court held that the repairs were minor, it nevertheless denied the shipfitter's claim, because his work was not work that

[4] "[T]he federal courts have consistently held that a maritime lien arises when the necessary is *provided* to the vessel." *Dresdner Bank AG v. M/V OLYMPIA VOYAGER*, 465 F.3d 1267, 1276 (11th Cir. 2006) (citations omitted).

a seaman would do. *Id. at* 232-233. This decision did nothing more than cite to a line of seaworthiness cases, in which the duty of seaworthiness was held to not be owed in the context of repairs. *Id. at* 232. Such rulings make sense. How can a ship owner owe a duty of seaworthiness to someone who is working to make the ship seaworthy? *See, e.g., West v. United States*, 361 U.S. 118, 122 (1959). (When a vessel has been taken to a repair contractor "for the sole purpose of making her seaworthy, [i]t would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case.") Again, Petitioner cites to a seaworthiness case which is wholly unrelated to the maritime lien for necessaries. *Delome* is thus distinguishable and inapplicable to this matter.

Petitioner next cites to *Robert E. Blake Inc. v. Excel Environmental*, 104 F.3d 1158 (9th Cir. 1997). *Blake* arose out of an injury claim filed by one Pollock against Robert E. Blake, Inc. ("Blake"). Blake had been hired by the U.S. Government in the fall of 1990 to repair and re-activate the S.S. CAPE BOVER, which had been out of service and in the ready reserve fleet for several years. Blake sub-contracted some of the work to Excel and on December 8, 1990 the ship engaged in successful sea trials. Pollock, Excel's employee, was injured on December 15, 1990 and filed suit thereafter. The opinion concerns Blake's efforts to seek indemnification from Excel pursuant to an unsigned purchase order which Blake issued to

Excel (prior to Excel's performance) for the damages claimed by Pollock.

The Court held that because the CAPE BOVER was a dead ship at the time the contract was formed ("Because the *Cape Bover* had been stored for "several years" and had been deactivated, the vessel was withdrawn from navigation and thus admiralty jurisdiction as well." *Id. at* 1160), California law governed the contract, rather than admiralty law, and Blake's third party claim for indemnity was thus barred. When Blake argued about the seeming inconsistency of allowing Pollock to recover in admiralty while Blake was denied admiralty jurisdiction, the Court noted that, "The contract was formed before the *Cape Bover* was reactivated while the injury occurred after the vessel successfully completed sea trials." *Id. at* 1163. Again, this case does not involve a maritime lien for necessaries, nor does it involve an arrest. Rather the case simply states that in the Ninth Circuit a contract to reactivate a dead ship is not maritime in nature. In this matter, as noted above, no one has claimed or could reasonably claim that the BETTY LYN II was a dead ship at the time Horizon began to work on it. It had not been out of service for several years when Horizon began work on it and it was not part of a reserve fleet. For these reasons, Blake is thus distinguishable and does not control or even provide by analogy, the correct rule of law.

Petitioner's citation to "dead ship" cases highlights its miscomprehension of the maritime lien for necessaries. The lien arises at the time necessaries are provided, i.e., when work begins on the vessel. Petitioner has not argued any facts which would tend to show that the BETTY LYN II had been mothballed, withdrawn from service, laid up, or stored for a period of several years before Horizon began to work on the vessel. The vessel was towed to the shipyard. It was a vessel when it arrived and there is simply no way, under logic, reason, or law it could have ceased to be a vessel, while or because the shipyard worked to refurbish it to be a luxury charter yacht. As noted by the Eleventh Circuit – "Congress could not have intended as the need for protection increased, the law's protection would retract. Thus, the maritime – lien system surely applies in scenarios such as this." *Crimson Yachts v. BETTY LYN II Motor Yacht*, 603 F.3d 864, 876 (11th Cir. 2010).

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals is well reasoned and correct. Petitioner has not established any compelling reason for this Court

to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

J. W. Goodloe, Jr.
Counsel of Record
Roy W. Harrell, III
Vickers, Riis, Murray and Curran, L.L.C.
56 St. Joseph Street,
11th Floor
Post Office Drawer 2568
Mobile, Alabama 36652
(251) 432-9772 Telephone
(251) 432-9781 Facsimile

Attorneys for Respondent, Crimson Yachts

July 14, 2010